Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1462

ROBERT McGUIRE, individually and as Police Commissioner of the City of New York,

Petitioner,

-against-

CHARLES W. LEIGH and LEONARD ALLEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	10
1. THE FAILURE OF THE COURT OF APPEALS TO BAR RESPONDENTS' CIVIL RIGHTS ACTION UNDER PRINCIPLES OF RES JUDICATA IS IN PLAIN DEROGATION OF 28 U.S.C. §1738 AND IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS	10
2. THE DECISION OF THE COURT OF APPEALS TO TOLL THE STATUTE OF LIMITATIONS FOR THE PERIOD DURING WHICH RESPONDENTS PURSUED THEIR REMEDY IN STATE COURT IS IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS AND IS CONTRARY TO A PROPER RESPECT FOR FEDERAL-STATE COMITY	23
3. SECTION 1983 SHOULD NOT BE CONSTRUED AS AUTHORIZING A SUIT OF THE INSTANT SORT	33
Conclusion	36
Opinion of the Court of Appeals	1a
Opinion of the District Court	11a
Order denying petition for rehearing and suggestion of rehearing en banc	25a

TABLE OF AUTHORITIES

Cases:	Page
American Mannex Corp. v. Rozands, 462 F. 2d 688 (5th Cir., 1972), cert. den., 409 U.S. 1040 (1972)	19
American Surety Co. v. Baldwin, 287 U.S. 156 (1932)	11,16
American Trial Lawyers Assn. v. New Jersey Supreme Court, 409 U.S. 467 (1973)	33
Ammlung v. City of Chicago, 494 F. 2d 812 (3d Cir., 1974)	30
Anderson v. Lecon, 457 F. 2d 929 (8th Cir., 1972), cert. den., 409 U.S. 879 (1972)	15
Angel v. Bullington, 330 U.S. 183 (1946)	20
Bevelander v. Town of Islip, 10 AD 2d 170 (3d Dept., 1960)	25
Billingsley v. Seibels, 556 F. 2d 277 (5th Cir., 1977)	27
Blair v. Page Aircraft Maintenance, Inc., 467 F. 2d 815 (5th Cir., (1972)	30
Blankner v. City of Chicago, 504 F. 2d 1037 (7th Cir., 1974), cert. den., 421 U.S. 948 (1975)	19
Bray v. Cox, 38 NY 2d 350 (1976)	14
Brown v. Chastain, 416 F. 2d 1012 (5th Cir., 1969), cert. den., 397 U.S. 951 (1970)	15

Page

Burnett v. New York Cent. R. Co., 380 U.S. 424 (1965)..... 29

Chapman v. Houston Welfare Rts. Org., 441 U.S. 600 (1979)..... 24,34, 35,36

Coogan v. Cincinnati Bar Assn., 431 F. 2d 1209 (6th Cir., 1970)..... 19

Davis v. Davis, 305 U.S. 32 (1938)..... 11

Duncan v. Nelson, 466 F. 2d 939 (7th Cir., 1972), cert. den., 409 U.S. 894 (1972)..... 30

Ellentuck v. Klein, 570 F. 2d 414 (2d Cir., 1978)..... 13,20

Fernandez v. Trias Monge, 586 F. 2d 848 (1st Cir., 1978)..... 18

Flynn v. State Bd. of Chiropractic Examiners, 418 F. 2d 669 (9th Cir., 1969)..... 19

Frazier v. East Baton Rouge Parish Sch. Bd., 363 F. 2d 861 (5th Cir., 1966)..... 18

Fulford v. Klein, 529 F. 2d 377 (5th Cir., 1977)..... 33

Garner v. Louisiana State Bd. of Educ., 489 F. 2d 91 (5th Cir., 1974), cert. den., 419 U.S. 830 (1974)..... 18

Gart v. Cole, 263 F. 2d 244 (2d Cir., 1958), cert. den., 359 U.S. 978 (1959)..... 16

Page

Goss v. State of Illinois, 312 F. 2d 257 (7th Cir., 1963)..... 15

Grubb v. Public Utilities Commn., 283 U.S. 470 (1930)..... 20

Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975)..... 33

Herendeen v. Champion Internat'l Corp., 525 F. 2d 130 (2d Cir., 1975)..... 12

Howe v. Brouse, 422 F. 2d 347 (8th Cir., 1970)..... 19

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)..... 13,21

Jensen v. Olson, 353 F. 2d 825 (8th Cir., 1965)..... 19

Johnson v. Department of Water and Power, 450 F. 2d 294 (9th Cir., 1971)..... 19

Johnson v. Railway Express Agency, 421 U.S. 454 (1975)..... 22,31

Jones v. Bombeck, 375 F. 2d 737 (3d Cir., 1967)..... 30

Kaiser v. Cahn, 510 F. 2d 282 (2d Cir., 1974)..... 24

Kauffman v. Moss, 420 F. 2d 1270 (3d Cir., 1970), cert. den. 400 U.S. 846 (1970)..... 18

Lackawana Police Benevolent Assn. v. Balen, 446 F. 2d 52 (2d Cir., 1971)..... 20

Page

Leigh v. Murphy, 42 NY 2d 823 (1977)..... 10

Lombard v. Board of Educ., 502 F. 2d 631 (2d Cir., 1974), cert. den., 420 U.S. 976 (1975)..... 17,21

Lovely v. Laliberte, 498 F. 2d 1261 (1st Cir., 1974)..... 18

Martin v. Delacambre, 578 F. 2d 1164 (5th Cir., 1979)..... 18

Mastraccio v. Ricci, 498 F. 2d 1257 (1st Cir., 1974), cert. den., 420 U.S. 909 (1975)..... 18

McCune v. Frank, 521 F. 2d 1152 (2d Cir., 1975)..... 17

Meyer v. Frank, 550 F. 2d 726 (2d Cir., 1977), cert. den., 434 U.S. 830 (1977)..... 24,25, 29,32

Mitchell v. National Broadcasting Co., 553 F. 2d 265 (2d Cir., 1975)..... 17

Mitchum v. Foster, 407 U.S. 226 (1972)..... 21

Monroe v. Pape, 365 U.S. 167 (1961)... 33

New Jersey Educ. Assn. v. Burke, 579 F. 2d 764 (3d Cir., 1978), cert. den., 439 U.S. 894 (1979)..... 18

Ornstein v. Regan, 574 F. 2d 115 (2d Cir., 1978)..... 17,20

Ortiz v. LeValle, 442 F. 2d 912 (2d Cir., 1971)..... 24

Page

PI Enterprises, Inc. v. Cataldo, 457 F. 2d 1012 (1st Cir., 1974)..... 18

Paul v. Dade County, 419 F. 2d 10 (5th Cir., 1969), cert. den., 407 U.S. 1065 (1970)..... 15

People v. Feinlowitz, 29 NY 2d 176 (1971)..... 5

People v. Koutnik, 44 AD 2d 48 (1st Dept., 1974), affd, 37 NY 2d 873 (1975)..... 7

Preiser v. Rodriguez, 411 U.S. 475 (1973)..... 20,21

Railroad Commn. of Texas v. Pullman Co., 312 U.S. 496 (1941)..... 33

Ramirez de Arellano v. Alvarez de Choudens, 573 F. 2d 315 (1st Cir., 1978)..... 30

Riley v. New York Trust Co., 315 U.S. 343 (1942)..... 11

Rimmer v. Fayetteville Police Dept., 567 F. 2d 273 (4th Cir., 1978)..... 18

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)..... 15,21

Rosenberg v. Martin, 478 F. 2d 520 (2d Cir., 1973), cert. den., 414 U.S. 872 (1973)..... 35

Roy v. Jones, 484 F. 2d 96 (3d Cir., 1973)..... 13,18

	Page
Schulykill Fuel Corp. v. B. & C. Neiberg Realty Corp., 250 N.Y. 304 (1929)	12,13
Scoggin v. Schrunk, 522 F. 2d 436 (9th Cir., 1975), cert. den., 405 U.S. 1072 (1976)	19
Shadid v. Oklahoma City, 494 F. 2d 1267 (10th Cir., 1974)	19
Sinicropi v. Nassau County, 601 F. 2d 60 (2d Cir., 1979)	20
State v. Cortelle Corp., 38 NY 2d 83 (1975)	25
Stefanelli v. Minard, 342 U.S. 117 (1951)	17,21
Stone v. Powell, 428 U.S. 465 (1976)	22,29, 35
Tang v. Appellate Division, 487 F. 2d 138 (2d Cir., 1973), cert. den., 416 U.S. 906 (1973)	15,20
Thistlethwaite v. City of N.Y., 497 F. 2d 339 (2d Cir., 1974), cert. den., 419 U.S. 1093 (1974)	20,26
Tomanio v. Board of Regents, 603 F. 2d 255 (2d Cir., 1979) cert. granted, 100 S. Ct. 291 (1979)	17,25
Turco v. Monroe County Bar Assn., 554 F. 2d 515 (2d Cir., 1977), cert. den., 434 U.S. 834 (1977)	20

	Page
United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966)	32
United States v. Janis, 428 U.S. 433 (1976)	29,34
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977)	21
Wiggins v. Murphy, 576 F. 2d 572 (4th Cir., 1978), cert. den., 439 U.S. 1081 (1979)	18
Williams v. Walsh, 558 F. 2d 667 (2d Cir., 1977)	25,29
Wilson's Executor v. Deen, 121 U.S. 525 (1887)	13
Wilt v. State Bd. of Educ., 608 F. 2d 1126 (6th Cir., 1979)	19
Winters v. Lavine, 574 F. 2d 46 (2d Cir., 1978)	17,20
Wolff v. McDonnell, 418 U.S. 539 (1974)	21
Younger v. Harris, 401 U.S. 37 (1971)	21,28

TABLE OF AUTHORITIES cont'd

Page

Statutes and other authorities

28 U.S.C. §1331..... 33
28 U.S.C. §1343..... 33
28 U.S.C. §1738..... 10

42 U.S.C. §1983..... 24,34, 35

47 U.S.C. §605..... 4,5,34, 35

Omnibus Crime Control and Safe Streets Act of 1968..... 5,34

New York CPLR 214(2)..... 24,25

New York CPLR 217..... 24,25

New York CPLR 5015(a)(5)..... 7

New York CPLR 5601(b)(1)..... 9

New York Gen. Mun. Law §50-i..... 25

Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317 (1978)..... 11,22

IN THE
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No.

ROBERT McGUIRE, individually and as Police Commissioner of the City of New York,

Petitioner,

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CHARLES W. LEIGH and LEONARD ALLEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The above named petitioner respectfully prays that a writ of certiorari issue in this case, directed to the United States Court of Appeals for the Second Circuit, to review its judgment dated December 19, 1979.

Opinions Below

The opinion of the Court of Appeals (1a-10a)* has not been officially reported

*Numbers in parentheses followed by "a" refer to the pages of the appendices annexed hereto.

as of this writing. The opinion of the District Court (11a-24a) is reported at 468 F. Supp. 1163.

Jurisdiction

The judgment of the Court of Appeals was entered December 19, 1979. A timely motion for rehearing en banc was denied on January 29, 1980 (25a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does a federal court have jurisdiction to entertain, as a civil rights action, a suit which would be otherwise barred in a state court under res judicata because of its having come to final judgment in the state's highest court?

2. Does 28 U.S.C. §1738 require that federal courts apply the local law of res judicata in civil rights cases where the state and federal issues were litigated to a conclusion in the state courts?

3. Does the concept of federalism prohibit a federal court from tolling a borrowed state statute of limitations in civil rights cases where the state's law on the subject does not so provide and where no overriding federal policy considerations are implicated?

4. Is 42 U.S.C. §1983 properly invoked where the alleged deprivation does not involve rights secured by the Constitution or by statutes providing for equal rights or for the protection of civil rights?

Statement of the Case

Respondents Charles W. Leigh and Leonard Allen (hereinafter "respondents") were appointed to the New York City Police Department on July 16, 1951 (JA 15, 46).* On July 2, 1968, they were indicted by a grand jury and charged with conspiring to take unlawful fees in violation of New York Penal Law §§580 and 1826 (JA 16).

*References are to pages of the Joint Appendix submitted to the court below.

Following the indictments, departmental charges and specifications were served upon respondents on July 30, 1969, alleging participation in a gambling operation and failure to enforce the anti-gambling laws (JA 16, 46).

During the departmental trial, respondents raised the defense that the wiretap evidence used against them had been illegally obtained in violation of the Fourth and Fourteenth Amendments of the Constitution and Section 605 of the Federal Communications Act (JA 16-17, 47). Respondents were found guilty on all the charges and specifications and were dismissed from the force by the then Acting Police Commissioner on October 7, 1970 (JA 17, 47).

Thereafter, they instituted a special proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), seeking to annul the order of dismissal, on the grounds, inter alia, that the Acting Commissioner's deter-

mination was arbitrary and capricious and based on evidence admitted in violation of the Constitution and federal statutory law (JA 47). The proceeding was transferred to the Appellate Division, First Judicial Department, where respondents raised and litigated their federal constitutional and statutory claims (JA 47-48).

On June 29, 1971, the Appellate Division annulled the Police Commissioner's order of dismissal on the ground that Section 605 of the Federal Communications Act precluded the admission of illegally procured evidence in administrative as well as criminal proceedings (JA 48). On the same day, the court also affirmed the decision in the criminal case against respondents, which decision ordered the wiretap evidence suppressed (JA 17-18). Shortly thereafter, however, the New York Court of Appeals decided People v. Feinlowitz, 29 NY 2d 176 (1971), which held that the Omnibus Crime Control and Safe Streets Act of 1968 allowed the admission of wiretap evidence

obtained prior to its effective date so long as the Act was substantially complied with (JA 18). Consequently, petitioners moved for reargument, and on September 30, 1971, upon granting the motion, the Appellate Division vacated its prior order of June 29, 1971 annulling the dismissals and confirmed the Police Commissioner's determination to dismiss the respondents. (JA 18, 48-49). In addition, in the criminal case, the court reversed its prior order granting suppression and remitted the matter to the trial judge to ascertain whether the evidence was admissable under section 605, as construed in Feinlowitz (JA 19).

Respondents then filed a notice of appeal to the New York Court of Appeals on October 19, 1971. That appeal was dismissed by the court on February 15, 1974 for failure to perfect, in that it was not timely argued or submitted pursuant to the rules of the court (JA 49).

In the interim, on November 29, 1972, respondents had been found guilty in cri-

minal court, on remand, of violating Penal Law §§580 and 1826 (JA 19). They each received six month jail terms and paid fines of $250. Enforcement of the jail terms was stayed pending the outcome of the appeal (JA 5). Respondents' appeal to the Appellate Division on their criminal convictions resulted in a finding dated February 25, 1974, that section 605 had not been substantially complied with and that the evidence was obtained in contravention of the Constitution. People v. Koutnik, 44 AD 2d 48. Accordingly, the Appellate Division vacated their convictions (JA 19).

On April 17, 1974, respondents moved in the Appellate Division for an order pursuant to CPLR 5015(a)(5) seeking to vacate that court's order of September 30, 1971 which confirmed their dismissals. The motion was grounded on the court's decision in People v. Koutnik, supra, and was granted on June 18, 1974. The court thus vacated its September 30, 1971 order and reinstated its June 29, 1971 order which annulled the

Police Commissioner's determination to dismiss respondents (JA 20, 50-51). The Commissioner, however, applied for a stay of the Appellate Division's June 18th order pending disposition of the Koutnik appeal in the New York Court of Appeals, and on December 5, 1974, the application was granted (JA 21, 51).

On October 23, 1975, the Court of Appeals affirmed the Koutnik decision (JA 21). Thereafter, the respondents moved in the Appellate Division to have that court vacate its previous stay which had been granted pending the Koutnik appeal. Petitioner cross-moved to vacate the court's June 18, 1974 order which reinstated its earlier order annulling the dismissals (JA 22, 51). The first ground for the petitioner's cross-motion was that the Appellate Division was without power to review the final order of the Court of Appeals of February 15, 1974 dismissing respondents' appeal for failure to perfect (JA 51-52). The second

ground concerned the exclusionary rule, to wit, that it was not mandated by the Constitution, but rather designed as a prophylactic to prevent the violation in the future of constitutional rights, whose purpose would not be furthered by rescinding the Police Commissioner's order terminating respondents' employment with the Department (JA 52).

On December 16, 1975, the Appellate Division, without opinion, granted petitioner's cross-motion, thereby vacating its June 18, 1974 order which had reinstated its earlier order annulling the dismissals, and denied respondents' motion as academic (JA 22, 52).

Respondents thereafter filed a second appeal to the Court of Appeals, on constitutional grounds, pursuant to CPLR 5601(b)(1) (JA 52). The respondents' jurisdictional submission in the Court of Appeals raised the federal constitutional claims in connection with the wiretap evidence introduced at the departmental trial (JA 53).

By order entered May 3, 1977, the Court of Appeals dismissed the appeal for want of a substantial constitutional question having been directly presented. Leigh v. Murphy, 42 NY 2d 823. Respondents subsequent motion for leave to appeal was denied on October 6, 1977. 42 NY 2d 809. Seven months later, on May 12, 1978, respondents commenced this civil rights action in the District Court for the Southern District of New York (SWEET, D.J.), raising the same constitutional and statutory claims as had been earlier presented.

REASONS FOR GRANTING THE WRIT

1. THE FAILURE OF THE COURT OF APPEALS TO BAR RESPONDENTS' CIVIL RIGHTS ACTION UNDER PRINCIPLES OF RES JUDICATA IS IN PLAIN DEROGATION OF 28 U.S.C. §1738 AND IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS.

(1)

Title 28 U.S.C. §1738 provides in pertinent part that "[t]he records and judicial proceedings of any court of any... State, Territory or Possession... shall

have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law in the courts of such State, Territory or Possession from which they are taken." This legislation, which finds its origin in the Judiciary Act of 1790, has been held to be applicable to federal courts (see, e.g., Davis v. Davis, 305 U.S. 32, 40 [1938]) and requires them to accord to state court judgments the same finality and conclusiveness they would receive in the jurisdiction of their rendition through that state's law of res judicata. See, e.g., Riley v. New York Trust Co., 315 U.S. 343, 349 (1942); American Surety Co. v. Baldwin, 287 U.S. 156, 165-167 (1932). As one commentator has stated, the act is not "a matter of judicial grace", but "is the command of Congress...." Currie, Res Judicata: The Neglected Defense, U. Chi. L. Rev. 317, 326 (1978).

In rejecting the petitioner's res judicata defense, the Court of Appeals completely ignored §1738's mandate, despite the fact that final judgments had been rendered by the New York Court of Appeals which were binding and conclusive on the parties concerned and entitled to res judicata effect in New York.* The first of these became conclusive on February 15, 1974, when the New York Court of Appeals dismissed respondents' appeal as of right for failure to prosecute. The appeal was from a final (as opposed to an interlocutory) judgment of the Appellate Division before which the parties had fully and fairly litigated the constitutionality of the wiretap evidence. Thus, respondents' failure timely

*The test of res judicata in New York is whether a "different judgment in [a subsequent action] would destroy or impair rights or interests established by the [earlier action]." Schuylkill Fuel Corp. v. B. & C. Neiberg Realty Corp., 250 N.Y. 304, 307, 308 (1929) (Cardozo, C. J.). Cf., Herendeen v. Champion Internat'l Corp., 525 F. 2d 130, 133 (2d Cir., 1975).

to perfect their appeal rendered the situation as if no appeal had been taken. Just as "'[t]he effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered'" (Schuylkill, supra at 306, quoting Wilson's Executor v. Deen, 121 U.S. 525, 534 [1887]), so too should it be not dependent upon whether the judgment became final because of a failure to prosecute the appeal.*

Respondents did not attempt to seek review before this Court as was then incumbent upon them to do. See, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975); Ellentuck v. Klein, 570 F. 2d 414 (2d Cir., 1978); Roy v. Jones, 484 F. 2d 96, 98, 99 (3d Cir., 1973).

The preclusive effect of the Appellate Division's judgment on the

*That the appeal was dismissed for failure to prosecute was conspicuously absent from the Court of Appeals' rendition of the facts.

merits was later recognized and reaffirmed on December 16, 1975 when that court vacated its June 18, 1974 order annulling the Police Commissioner's determination to dismiss respondents from the Police Department and reinstated its September 30, 1971 order confirming their dismissals. Respondents' appeal as of right from this order was dismissed on May 3, 1977 for lack of a substantial constitutional question having been directly presented. Compare Bray v. Cox, 38 NY 2d 350 (1976).

As a result of the above sequence of events, when respondents filed their present §1983 action in the District Court in May 1978, raising the identical constitutional issues as had been decided against them in their state action, against the same parties, and on the same facts, it should have been barred by New York's law of res judicata as applied through the full faith and credit provision of §1738. The failure of the District Court to dismiss the suit on that

basis was upheld by the court below without reference to §1738.

In so doing, the court below permitted the District Court to do indirectly what this Court has said it did not have jurisdiction to do directly, that is, sit as an appellate tribunal reviewing the judgments of the highest court of a state. See, Rooker v. Fidelity Trust Co., 263 U.S. 413, 415, 416 (1923); see also, Paul v. Dade County, 419 F. 2d 10, 13 (5th Cir., 1969), cert. den., 397 U.S. 1065 (1970); Brown v. Chastain, 416 F. 2d 1012, 1013 (5th Cir., 1969), cert. den., 397 U.S. 951 (1970); Tang v. Appellate Division, 487 F. 2d 138, 141 (2d Cir., 1973), cert. den., 416 U.S. 906 (1973); Anderson v. Lecon, 457 F. 2d 929, 930 (8th Cir., 1972), cert. den., 409 U.S. 879 (1972); Goss v. State of Illinois, 312 F. 2d 257, 259 (7th Cir., 1963). Consistent with this principle, this Court has held that the Full Faith and Credit Clause of the United States Constitution, together with the legis-

lative enactments related thereto, requires that state judgments be given the same res judicata effect in federal court as in state court, even where federal constitutional questions are involved. See, American Surety Co. v. Baldwin, supra, 287 U.S. at 165-166. See also, Gart v. Cole, 263 F. 2d 244, 247-248 (2d Cir., 1958), cert. den., 359 U.S. 978 (1959).

We respectfully submit that the Court of Appeals' rejection here of the defense of res judicata, aside from being a clear violation of a statutory imperative, constitutes a direct affront to the courts of New York, undermines the respect to which final judgments of the courts of the states are justly entitled, threatens the vital interests of federal-state comity sought to be fostered by §1738, which is absolutely necessary to the smooth functioning of a federal judicial system, and, unwarrantedly, and improperly, tends toward the ultimate concentration of

judicial power in the federal courts. See, Stefanelli v. Minard, 342 U.S. 117, 121 (1951).

Recent cases by the Court of Appeals for the Second Circuit demonstrate that court's insistence on exercising jurisdiction in civil rights cases despite the prevailing local law of res judicata and §1738. See, e.g., Tomanio v. Board of Regents, 603 F. 2d 255, 258 (1979), cert. granted, 100 S. Ct. 291 (1979) (decision pending in this Court); Winters v. Lavine, 574 F. 2d 41, 54-55 (1978); Ornstein v. Regan, 574 F. 2d 115, 117 (1978); Mitchell v. National Broadcasting Co., 553 F. 2d 265, 279, n. 6 (1977); McCune v. Frank, 521 F. 2d 1152, 1156, n. 10 (1975); Lombard v. Board of Educ., 502 F. 2d 631 (1974), cert. den., 420 U.S. 976 (1975).

(2)

The decision of the court below is in sharp conflict with the majority of Circuit Courts on the applicability of res judicata to Civil Rights Act cases. See:

First Circuit: PI Enterprises, Inc. v. Cataldo, 457 F. 2d 1012, 1014 (1972); Lovely v. Laliberte, 498 F. 2d 1261, 1263 (1974); Mastraccio v. Ricci, 498 F. 2d 1257, 1258 (1974), cert. den., 420 U.S. 909 (1975) (stating the rule as well established); but cf., Fernandez v. Trias Monge, 586 F. 2d 848 (1978).

Third Circuit: Roy v. Jones, 484 F. 2d 96, 98 (1973); Kauffman v. Moss, 420 F. 2d 1270, 1274 (1970), cert. den., 400 U.S. 846 (1970); but cf., New Jersey Educ. Assn. v. Burke, 579 F. 2d 764, 774 (3d Cir., 1978), cert. den., 439 U.S. 899 (1979).

Fourth Circuit: Wiggins v. Murphy, 576 F. 2d 572, 573 (1978), cert. den., 439 U.S. 1091 (1979); Rimmer v. Fayetteville Police Dept., 567 F. 2d 273, 276 (1978).

Fifth Circuit: Martin v. Delacambre, 578 F. 2d 1164, 1165 (1978); Garner v. Louisiana State Bd. of Educ., 489 F. 2d 91 (1974), cert. den., 419 U.S. 830 (1974); Frazier v. East Baton Rouge Sch. Bd., 363

F. 2d 861, 862 (1966); but cf., American Mannex Corp. v. Rozands, 462 F. 2d 688, 690 (1972), cert. den., 409 U.S. 1040 (1972).

Sixth Circuit: Wilt v. State Bd. of Educ., 608 F. 2d 1126, 1128 (1979); Coogan v. Cincinnati Bar Assn., 431 F. 2d 1209, 1211 (1970).

Seventh Circuit: Blankner v. City of Chicago, 504 F. 2d 1037, 1041 (1974), cert. den., 421 U.S. 948 (1975).

Eighth Circuit: Howe v. Brouse, 432 F. 2d 347, 348 (1970); Jensen v. Olson, 353 F. 2d 825, 827 (1965).

Ninth Circuit: Scoggin v. Schrunk, 522 F. 2d 436, 437 (1975), cert. den., 423 U.S. 1066 (1976); Johnson v. Department of Water and Power, 450 F. 2d 294, 295 (1971), cert. den., 405 U.S. 1072 (1972); Flynn v. State Bd. of Chiropractic Examiners, 418 F. 2d 668 (1969).

Tenth Circuit: Shadid v. Oklahoma City, 494 F. 2d 1267, 1268 (1974).

In addition, the Second Circuit appears to apply its view of res judicata selectively, and in a manner which evidences at least considerable confusion on the part of that court. See, e.g., Sinicropi v. Nassau County, 601 F. 2d 60 (2d Cir., 1979); Winters v. Lavine, supra, 574 F. 2d at 54-60; Ornstein v. Regan, supra, 574 F. 2d at 117; Ellentuck v. Klein, supra, 570 F. 2d at 422; Turco v. Monroe County Bar Assn., 554 F. 2d 515, 520 (2d Cir., 1977), cert. den., 434 U.S. 834 (1977); Thistlethwaite v. City of N.Y., 497 F. 2d 339, 341 (2d Cir., 1974), cert. den., 419 U.S. 1093 (1974); Tang v. Appellate Division, supra, 487 F. 2d 138; Lackawana Police Benevolent Assn. v. Balen, 446 F. 2d 52, 53 (2d Cir., 1971).

The holding below is also inconsistent with this Court's decisions in Preiser v. Rodriguez, 411 U.S. 475, 497 (1973); Angel v. Bullington, 330 U.S. 183, 186 (1946); and Grubb v. Public Utilities Commn., 281

U.S. 470, 476-479 (1930). See also, Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977) (plurality opinion per REHNQUIST, J.); Huffman v. Pursue, Ltd., supra, 420 U.S. at 606, n. 18; and Wolff v. McDonnell, 418 U.S. 539, 554, n. 12 (1974).

Petitioner submits that no substantial policy reasons exist for treating §1983 actions as immune from the application of res judicata. The notion that state courts are inadequate to the task of deciding constitutional issues or are generally unsympathetic to civil rights plaintiffs (see Mr. Justice BRENNAN's dissent in Preiser, supra, 411 U.S. at 509, n. 14; cf., Lombard v. Board of Educ., supra, 502 F. 2d at 635) is outdated and contrary to this Court's views of federal-state comity (see Huffman v. Pursue, Ltd., supra, 420 U.S. at 609; Younger v. Harris, 401 U.S. 37 [1971]; Rooker v. Fidelity Trust Co., supra, 263 U.S. at 415; cf., Mitchum v. Foster, 407 U.S. 226, 232-233 [1972]; Stefanelli v. Minard, supra, 342 U.S. at 121) as well

as to §1738. See Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 328-332 (1978). Cf., Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

Nor can it be said that in the case at bar respondents were faced with an inadequate state remedy either in law or practice, or that they were denied due process of law as a result of the introduction of the wiretap evidence so as to justify the failure to accord the state court judgments any degree of finality. Indeed, the right alleged to have been infringed is not personal to respondents, and the purported denial of it did not undercut the essential fairness of their trial (see, Stone v. Powell, 428 U.S. 465 [1976]); nor is it claimed that respondents were denied procedural due process.

If the Court of Appeals' decision is allowed to stand on the facts of this case, it will seriously frustrate the salutary purposes of the res judicata doctrine of encouraging, in addition to respect for

the integrity of state court proceedings, an end to litigation and economy of judicial resources. In light of the apparent conflict among the Circuit Courts, this Court should grant certiorari and finally resolve the issues squarely presented for review.

2. THE DECISION OF THE COURT OF APPEALS TO TOLL THE STATUTE OF LIMITATIONS FOR THE PERIOD DURING WHICH RESPONDENTS PURSUED THEIR REMEDY IN STATE COURT IS IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS AND IS CONTRARY TO A PROPER RESPECT FOR FEDERAL-STATE COMITY.

The court below erred in tolling the statute of limitations for much the same reasons that it erred in failing to bar the federal action under res judicata. The policies of judicial economy and putting an end to litigation apply equally as well here where the respondents had every opportunity to litigate their state and federal claims to a conclusion in the New York Court of Appeals. Additionally, the same affront to the state courts' integrity is present here as in the res judicata context. That these problems in fact exist is indicated

by this Court's grant of certiorari in Board of Regents v. Tomanio, 100 S. Ct. 291 (1979) (decision pending).

(1)

Under New York Law, a proceeding to review a final determination of an administrative body must be commenced within four months. CPLR 217. The Second Circuit Court of Appeals, however, has applied a three year statute of limitations to §1983 cases borrowed from CPLR 214 (2). See, e.g., Meyer v. Frank, 550 F. 2d 726, 728 (2d Cir., 1977), cert. den., 434 U.S. 830 (1977); Kaiser v. Cahn, 510 F. 2d 282, 284 (2d Cir., 1974); Ortiz v. LeValle, 442 F. 2d 912, 914 (2d Cir., 1971).

The rationale supporting this choice has been substantially impaired by this Court's decision in Chapman v. Houston Welfare Rts. Org., 441 U.S. 600, 618 (1979), in which it was held that §1983 is not a statute which creates substantive rights, but, rather, "only gives a remedy." When CPLR 214(2) refers to

actions "to recover upon a liability... created or imposed by statute", it refers to statutes which create substantive rights. See, State v. Cortelle Corp., 38 NY 2d 83 (1975); Bevelander v. Town of Islip, 10 AD 2d 170 (2d Dept., 1960). Therefore, CPLR 214 (2) is not the most appropriate statute of limitations in a §1983 action in New York.*

(2)

Upon reading the Court of Appeals opinions in Williams v. Walsh, 558 F. 2d 606 (2d Cir., 1977) and Meyer v. Frank, supra, 550 F. 2d 726, (and see Tomanio v. Board of Regents, supra, 603 F. 2d at 258), one would think that the present case would have been decided in conformity therewith. In Williams and Meyer, the Court stressed that the plaintiffs did not raise their constitutional claims in their state court actions and that, therefore, the federal

*We believe the appropriate statute of limitations to be applied in this case is CPLR 217 (four months). However, if that is not applied, the next most appropriate statute of limitations is New York General Municipal Law §50-i (one year and 90 days).

courts would not be precluded by the principles of federalism from entertaining them. Both cases were distinguished by the court below, however, apparently because a criminal prosecution was pending against respondents at the same time that their Article 78 proceeding was being litigated. Whether a criminal prosecution was then in progress, albeit predicated on the same evidence as was used in the civil proceeding, is irrelevant here because the New York Court of Appeals, in dismissing respondents' second appeal, did not consider itself bound by the outcome in the criminal action, which was determined after that court's dismissal of respondents' first appeal for failure to prosecute.

The court below further declared that since respondents did not "choose" the state forum in which to litigate their federal claims they could not have held those claims in reserve and thus could not be precluded from relitigating them in federal court. (But compare Thistle-

thwaite v. City of New York, supra, 497 F. 2d at 341-342; and Billingsley v. Seibels, 556 F. 2d 277 [5th Cir., 1977]). This too, we suggest, is immaterial since respondents' ultimately unsuccessful appeals through two tiers of state appellate courts were concerned solely with their Article 78 proceeding and were at no time dependent, as those courts so found, upon the resolution of the criminal case despite the Appellate Division's desire to treat the cases uniformly.

While respondents may have been involuntary parties to the criminal suit, that was not true with respect to the Article 78 proceeding. The fact that they were defendants in the criminal action should have no bearing on the decision to invoke res judicata or toll the statute of limitations inasmuch as it assumes sub silentio what we have earlier argued is the obsolete notion that state courts are not fully capable of resolving constitutional issues and are unsympathetic to

§1983 plaintiffs. In this context, we would note that although the court below made several references to Younger v. Harris and its progeny, it nowhere stated that respondents would have been met with an abstention-based dismissal of their complaint had they attempted to enter federal court immediately after their cause of action accrued in October 1970. Indeed, it is far from certain that respondents would have been denied a federal forum at that time or that they could not have persuaded the court to retain jurisdiction pending the outcome of the state proceedings.

We are at a loss to understand how the court below, in the interest of federalism, can speak of deferring the federal action until all the state-created issues are decided in state court when to have done so here, where respondents exhaustively litigated their state and federal questions in state court, was effectively to nullify all that had gone before in the state courts.

This is particularly perplexing inasmuch as respondents have urged no overriding federal policy concerns, least of which any personal to themselves, so as to warrant tolling in the interests of justice. Cf., Burnett v. New York Cent. R. Co., 380 U.S. 424, 428 (1965). See United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, supra, 428 U.S. 465. Under the circumstances at bar, we greatly doubt that the balancing of substantive federal policies against those behind statutes of limitations, discussed in Williams v. Walsh, supra, 558 F. 2d at 674, and Meyer v. Frank, supra, 550 F. 2d at 729, tilts in respondents' favor.

(3)

The decision to toll the borrowed state statute of limitations is in conflict with the decisions of other circuit courts, because while the court expressed "no doubt that a federal court has the power to toll borrowed statutes of limitations in §1983 actions" (6a) (but cf.,

Ramirez de Arellano v. Alvarez de Choudens, 575 F. 2d 315, 319 [1st Cir., 1978]), it omitted the corollary to that purported rule that federal courts should apply the state's laws on tolling in addition to the limitations period itself. See, Ammlung v. City of Chester, 494 F. 2d 811, 815 (3d Cir., 1974), citing Duncan v. Nelson, 466 F. 2d 939, 941 (7th Cir., 1972), cert. den., 409 U.S. 894 (1972), and Jones v. Bombeck, 375 F. 2d 737, 738-739 (3d Cir., 1962). Cf., Blair v. Page Aircraft Maintenance, Inc., 467 F. 2d 815, 821 (Tuttle, C.J., concurring and dissenting.

The Ammlung court declared that "due regard for our system of federalism requires that state concepts of tolling be applied to state statutes of limitations" (494 F. 2d at 816). As New York has no tolling statute pertinent to the instant matter, we submit the court below was incorrect in borrowing its statute of limitations while eschewing those laws and policies which are part and parcel thereto.

See, Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975):

> In virtually all statutes of limitations the chronological length of the limitation period is interrelated with the provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exemptions thereto, on the prosecution of a closely analogous claim.

(4)

A further rationale for the court's decision was that the policies behind the strict enforcement of statutes of limitations would not be frustrated by tolling. While the court below pointed to the alleged diligence with which the respondents pursued their claims it neglected to mention that almost two and a half years passed between the filing of their first appeal to the New York Court of Appeals in September 1971 and its dismissal by that court in February 1974 for failure to prosecute. Nor did the Court of Appeals refer to the year long

interim between the second dismissal of respondents' appeal in May 1977 and the filing of their §1983 complaint in May 1978. Also unnoted is the seven month delay from the denial of respondents' motion for leave to appeal in October 1977 to the filing of the federal complaint. This is hardly the diligence one would expect from litigants eager to press their claims in federal court. Cf., United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 708 (1966); Meyer v. Frank, supra, 550 F. 2d at 730.

Furthermore, the conclusion that petitioner was not "lulled" into believing respondents' §1983 claims would never be raised is not compelling since petitioner could well have expected that, given the above delays, respondents would not have sought to raise the identical federal issues in federal court, particularly since those issues were "hotly contested throughout the state proceedings." (9a).

Having made no effort whatsoever to enter federal court when their claim accrued in October 1970, or at least to have requested the court to retain jurisdiction were they to have been faced with abstention (see, e.g., Harris County Commn'rs Court v. Moore, 420 U.S. 77, 88, n. 14 [1975]; American Trial Lawyers' Assn., v. New Jersey Sup. Ct., 409 U.S. 467, 469 [1973]; Railroad Commn. of Texas v. Pullman Co., 312 U.S. 496, 501-502 [1941]; Fulford v. Klein, 529 F. 2d 377, 378 [5th Cir., 1977]), respondents should not now be permitted to take advantage of the second bite at the cherry afforded them by the Court of Appeals.*

3. SECTION 1983 SHOULD NOT BE CONSTRUED AS AUTHORIZING A SUIT OF THE INSTANT SORT.

Although respondents premise their claim of District Court jurisdiction on 28 U.S.C. §§1331 and 1343, we submit, neverthe-

*As this Court well knows, state court remedies need not be first exhausted before recourse may be had to federal court under §1983. See, Monroe v. Pape, 365 U.S. 167, 183 (1961).

less, that they have not alleged a deprivation of rights secured by the Constitution or by act of Congress providing for equal rights or for the protection of civil rights, including the right to vote. Chapman v. Houston Welfare Rts. Org., supra, 441 U.S. at 615-620. Consequently, their action is not authorized by 42 U.S.C. §1983 as being based on a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws..." 42 U.S.C. § 1983.

Neither the Constitution, nor §605 of the Federal Communications Act (47 U.S.C. §605), nor the Omnibus Crime Control and Safe Streets Act of 1968 "secured" to the respondents any "rights, privileges or immunities"; rather, respondents were at most incidental beneficiaries of exclusionary rules which were adopted by the courts, and later by Congress in the Omnibus Crime Control Act, to serve ends other than protecting wrongdoers. As United States v. Janis, supra, 428 U.S.

433, and Stone v. Powell, supra, 428 U.S. 465, seem clearly to indicate, whatever rights respondents may have to object to the admission of the wiretap evidence are not secured to them by the Constitution or Section 605 of the Federal Communications Act. The judge-made rule of exclusion was not designed for respondents' benefit. Its "primary justification... is the deterrence of police conduct that violates Fourth Amendment rights." Stone v. Powell, supra, 428 U.S. at 486. See also, Rosenberg v. Martin, 478 F. 2d 520, 524 (2d Cir., 1973), cert. den., 414 U.S. 872 (1973).

In support of our argument that such "rights", even assuming, arguendo, the applicability here of the Omnibus Crime Control Act, are not among the statutory "secured rights, privileges, and immunities" referred to in §1983, we respectfully refer the Court to Mr. Justice POWELL's concurring opinion in Chapman, supra, at 623-646, joined in by the CHIEF JUSTICE and Mr.

Justice REHNQUIST, where we believe the point is convincingly demonstrated that this language in §1983 has reference only to the Constitution and "federal legislation providing specifically for equality of rights" (441 U.S. at 637). Since the rights asserted here are not of that character, if Mr. Justice POWELL's exhuastively documented thesis as to the scope of §1983 is accepted, then it follows that this is not a proper §1983 action.

Conclusion

The short of the matter here is that by a combination of strained approaches, the Court of Appeals for the Second Circuit has negated the policies behind the doctrine of res judicata and §1738 and behind recognition of statutes of limitations, and thus allowed respondents to enter federal court and be heard on claims which accrued eight years earlier and which could have been litigated in the state proceeding and, indeed, were litigated

in that proceeding. To the extent this result is not simply absurd, it is at least an affront both to Congress, which enacted §1738, and to the courts of the State of New York.

A writ of certiorari should issue to review the judgment and order of the Second Circuit Court of Appeals.

March 14, 1980

Respectfully submitted,

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APPENDIX A
OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 290—September Term, 1979.

(Argued November 1, 1979
Decided December 19, 1979.)

Docket No. 79-7479

CHARLES W. LEIGH and LEONARD ALLEN,

Appellants,

—v.—

ROBERT MCGUIRE, individually and as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the Police Pension Fund, Article II,

Appellee.

Before:

MOORE, TIMBERS and VAN GRAAFEILAND,
Circuit Judges.

Appeal from a judgment entered in the Southern District of New York, Robert W. Sweet, *District Judge*, granting defendant Police Commissioner's motion for summary judgment and dismissing the civil rights

complaint of former New York City police officers on the ground the action was barred by the New York three-year statute of limitations.

Reversed and remanded.

VICTOR J. HERWITZ, New York, N.Y. (Donald E. Nawi, New York, N.Y., on the brief), *for appellants.*

L. KEVIN SHERIDAN, New York, N.Y. (Alexander G. Schwartz, Corporation Counsel, City of New York, and Alexander J. Wulwick, New York, N.Y., on the brief), *for appellee.*

TIMBERS, *Circuit Judge:*

Appellants, two former police officers who were discharged from the New York City Police Department in 1970, commenced the instant action in the Southern District of New York on May 12, 1978 pursuant to 42 U.S.C. §1983 (1976), seeking to vacate and annul their dismissal from the force. The basis of their action was that the use of illegally obtained wiretap evidence against them in Police Department proceedings violated their rights under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2511 *et seq.* (1976), and under the Fourth and Fourteenth Amendments. The district court in an opinion filed April 6, 1979 granted summary judgment for appellee Police Commissioner, ruling that the action was barred by the applicable New York three-year statute of limitations.

From the judgment entered on Judge Sweet's opinion, this appeal has been taken.

The issue on appeal is whether the statute of limitations should be tolled during the period in which appellants litigated the same substantive claim in the New York state courts. Under the circumstances of this case, we hold that the statute should be tolled. We therefore reverse and remand.[1]

I.

In view of the narrow legal issue on which this appeal turns, we cut through the procedural morass of state court proceedings during the past decade and briefly summarize here only those facts and prior proceedings believed necessary to an understanding of our ruling on the legal issue presented.[2]

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1 Although the district court dismissed the complaint as time-barred, it also held that the action would not have been barred by res judicata. We agree with the district court's conclusion in that respect, and therefore affirm on that issue.

Although appellants' discharges ultimately were upheld by the New York courts in an Article 78 proceeding, that decision was the result of an apparent procedural ruling. In no sense could appellees be regarded as having lost on the merits of the issues which formed the basis of their instant §1983 action. On the contrary, the state court decision in *People v. Koutnik*, 44 A.D.2d 48, 353 N.Y.S.2d 197 (1st Dept. 1974), *aff'd*, 37 N.Y.2d 873, 340 N.E.2d 727, 378 N.Y.S.2d 360 (1975), vindicated appellants' claims of wiretap illegality.

Therefore, in view of the fact that appellants presented their federal claims successfully to the New York courts, and were not denied relief because they lost on the merits of those issues, we believe that the district court was correct in ruling that res judicata would not bar the §1983 action. *See Winters v. Lavine*, 574 F.2d 46 (2 Cir. 1978); *Lombard v. Board of Education*, 502 F.2d 631 (2 Cir. 1974), *cert. denied*, 420 U.S. 976 (1975).

2 We assume familiarity with Judge Sweet's succinct, well reasoned opinion of April 6, 1979.

Appellants Charles Leigh and Leonard Allen joined the New York City Police Department in 1951. In 1968 they were indicted for an alleged conspiracy to accept bribes from gamblers. They were suspended from the force without pay. In October 1970 the Acting Police Commissioner made a final determination dismissing appellants from the force. Appellants then commenced an Article 78 proceeding, N.Y. Civ. Prac. Law §7801 (McKinney 1963), alleging, inter alia, that their dismissals were based on evidence obtained by means of illegal wiretaps. From this point on, appellants' Article 78 and criminal proceedings progressed "in tandem" through the New York courts. Although technically separate, the issues presented in each were substantially the same. The New York courts recognized that the criminal and Article 78 proceedings were closely tied.[3]

Appellants' dismissal from the force was upheld by the Appellate Division, First Department, in 1971. The following year they were convicted on the criminal charges. In February 1974, however, the Appellate Division ruled that certain wiretap evidence which had been used in appellants' criminal trial had been obtained illegally. Their convictions, therefore (along with the convictions of several other defendants), were vacated. *People v. Koutnik, supra* note 1. Because of the wiretap ruling in *Koutnik*, the Appellate Division entered an order on June 18, 1974 which annulled appellants' dismissal from the police force. This order of

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3 In its Memorandum Opinion of June 18, 1974, the Appellate Division stated that "[t]hroughout these entire proceedings this Court has considered the criminal and Article 78 proceedings together in an attempt to achieve a uniform and just result." *Allen v. Murphy*, 45 A.D.2d 693, 356 N.Y.S.2d 865, 867 (1st Dept. 1974).

annulment was stayed, however, pending the state's appeal from the Appellate Division's ruling in *Koutnik*.

In October 1975 the New York Court of Appeals affirmed the Appellate Division's ruling in *Koutnik* that the wiretap evidence had been illegally obtained. Since the Court of Appeals decision ostensibly settled once and for all that the wiretap evidence against appellants—the basis for the bribery charges in both the departmental and the criminal proceedings—had been obtained illegally and hence was inadmissible, appellants sought appropriate final relief in their Article 78 proceeding. They therefore moved in the Appellate Division to vacate the stay of the June 18, 1974 order which had annulled their dismissals from the police force. In December 1975, however, the Appellate Division, without opinion, denied appellants' motion and instead granted the motion of the Police Commissioner to vacate the June 18, 1974 order of annulment.[4]

The final result of the extensive proceedings in the state courts was that appellants succeeded in establishing their claims of constitutional violations, and yet were denied relief. In an effort to correct this incongruous result, appellants commenced the instant §1983 action to obtain the relief which had been denied them at the state level.

II.

It is well established that in an action brought under §1983 federal courts should apply the statute of limitations applicable to the most similar state cause of action. *Williams v. Walsh*, 558 F.2d 667, 670 (2 Cir. 1977); *Kaiser v. Cahn*, 510 F.2d 282, 284 (2 Cir. 1974). In this case, the New York three-year statute of limitations must govern the claim.[5] Appellants' cause of action first accrued when they were dismissed from the force in 1970. Their §1983 action was not commenced until May 1978. Appellants argue, however, that the §1983 complaint was timely filed because the statute of limitations was tolled until at least December 1975, while they litigated their claims in the state courts.

There is no doubt that a federal court has the power to toll borrowed statutes of limitations in §1983 actions. *Meyer v. Frank*, 550 F.2d 726, 729 (2 Cir.), *cert. denied*, 434 U.S. 830 (1977); *Kaiser v. Cahn, supra*, 510 F.2d at 286-87. The question before us today is whether the circumstances of this case warrant such tolling. In answering this question, we must attempt to balance policies of federalism which are served by tolling the statute of limitations against policies of repose served by strict application of the statute of limitations.

Ordinarily, the remedial policy underlying §1983 would not be impinged by strict application of the three-year state limitations period, since §1983 plaintiffs are not required to exhaust state remedies before seeking federal relief. Nevertheless, considerations of comity and federalism under some circumstances do require that the statute of limitations be tolled during the pendency of state court or agency proceedings. Federal courts should avoid as much as possible "in-

4 The reasoning behind the Appellate Division's refusal to grant appellants' request for ultimate relief is unclear. Presumably it reflected the court's view that, for procedural reasons, the Appellate Division should not upset its original ruling in the case.

5 N.Y. Civ. Prac. Law §214(2) (McKinney Supp. 1975). This section includes actions "to recover upon a liability, penalty or forfeiture created or imposed by statute. . . ."

truding upon the domain which is particularly the responsibility of the state courts". *Williams v. Walsh, supra*, 558 F.2d at 674. Thus, where a potential §1983 plaintiff initially enters the state courts or administrative agencies to prosecute *state-created* claims, federal courts have tolled the §1983 statute of limitations during the pendency of the state or administrative proceedings. In this way, federal courts have protected the plaintiff's right to seek his federal remedies under §1983 without interfering with the state's resolution of its own causes of action. *Tomanio v. Board of Regents*, 603 F.2d 255 (2 Cir. 1979); *Mizell v. North Broward Hospital District*, 427 F.2d 468 (5 Cir. 1970); *see Williams v. Walsh, supra*, 558 F.2d at 674.

In the instant case, the district court, relying upon *Meyer v. Frank, supra*, and *Williams v. Walsh, supra*, held that tolling would not further the interests of federalism because appellants raised both state and federal issues in the state courts. Thus, concluded the court, "the policy of avoiding federal interference with state affairs survives here in a diluted posture." (quoting *Meyer v. Frank, supra*, 550 F.2d at 729).

The mere fact that federal claims were raised in the state proceedings, however, does not necessitate the conclusion that policies of federalism do not support tolling. Here, appellants were being *criminally* prosecuted, and as stated above, the Article 78 proceeding was very much intertwined with the criminal proceedings. When the Appellate Division found the wiretaps illegal in the criminal case of *People v. Koutnik, supra*, for example, it also vacated the dismissal orders in the Article 78 proceeding, noting that the civil and criminal actions required a "uniform result." *See* note 3, *supra*.

The fact that appellants' federal claims were raised in criminal proceedings and in the Article 78 proceeding closely tied to the criminal proceedings distinguishes this case from *Meyer* and *Williams*. Unlike in *Meyer* and *Williams*, appellants here did not "choose" the state forum to litigate their federal claims while holding the federal forum "in reserve." *Meyer v. Frank, supra*, 550 F.2d at 729. Appellants were forced to raise their constitutional claims as a defense in their state trial. Moreover, the interrelationship of the criminal and civil actions at the state level provides strong support for the conclusion that the statute of limitations should be tolled here. Federal courts must be particularly wary of interfering with the functions of state courts when state criminal proceedings are involved. *See generally Younger v. Harris*, 401 U.S. 37 (1971); *Steffel v. Thompson*, 415 U.S. 452 (1974); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Interests of federalism, therefore, favored the deferral of the federal action here until the issues all were finally resolved in the state criminal proceedings, including two levels of appeals.

By tolling the statute of limitations during the pendency of appellants' Article 78 proceeding and the criminal appeals involving the issue of wiretap illegality, we are able to comply with the *Younger* rule that federal courts should "vindicate and protect federal rights and federal interests . . . in ways that will not unduly interfere with the legitimate activities of the States." *Huffman v. Pursue, Ltd., supra*, 420 U.S. at 601 (quoting *Younger v. Harris, supra*, 401 U.S. at 44). Tolling here permits the federal courts to show the "proper respect for state functions", *Younger v. Harris, supra*, 401 U.S. at 44, by permitting final resolution of

issues in state criminal appeals, while at the same time enabling us to preserve the right of appellants to vindicate their federal claims under §1983.

We therefore hold that the district court erred in its belief that concepts of federalism do not support tolling under the circumstances of this case.

III.

Having concluded that the remedial policy of §1983 and considerations of federalism support tolling in this case, we turn now to a consideration of the policies served by strict application of the three-year statute of limitations.

Strict enforcement of statutes of limitations protects defendants who have been "lulled" into a state of repose by plaintiffs who have "slept on their rights". *See Meyer v. Frank, supra,* 550 F.2d at 730. In the instant case, however, appellants were diligent in the pursuit of their claims, having raised the federal issues in the state courts almost immediately after their discharge from the police force. By no means can they be regarded as having "slept" on their rights. Likewise, appellants did not "lull" appellee into believing that the federal issues underlying the §1983 claims would never be raised. The precise issues involving wiretap illegality that form the basis of the §1983 action were hotly contested throughout the state proceedings.[6] Thus, the policies traditionally served by strict enforcement of the statute of limitations will not be frustrated by tolling in this case.

6 It may be noted further that the state court records have preserved most of the relevant evidence in this case. The federal court therefore is not faced with the prospect of adjudicating "stale" claims.

To summarize: we hold, under the special circumstances of this case, that federalism considerations support the tolling of the statute of limitations governing the §1983 action during the pendency of the interrelated state criminal and Article 78 proceedings; and that the policies of repose underlying the statute of limitations will not be adversely affected by such tolling. We therefore reverse the holding of the district court that appellants' §1983 action is time-barred.

Reversed and remanded.

APPENDIX B

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CHARLES W. LEIGH and LEONARD ALLEN,

Plaintiffs,

-against-

ROBERT McGUIRE, individually and as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the Police Pension Fund, Article II.,

Defendants.

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78 Civ. 2210 (RWS)

OPINION

SWEET, D. J.

After nine years of litigation in the New York State courts, plaintiffs Charles W. Leigh and Leonard Allen ("the officers") commenced an action in this court, pursuant to 42 U.S.C. § 1983, seeking to vacate and annul their dismissal from the New York City Police Department in 1968. The officers assert that the use of illegally obtained wiretap evidence in their Police Department trial deprived them of rights

secured by the United States Constitution and the Omnibus Crime Control Act. Defendant Robert B. Maguire, the Police Commissioner of New York City ("the Commissioner") now moves, and plaintiffs cross-move, for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons discussed below, the Commissioner's motion is granted, and the officers' cross motion denied.

The resolution of the pending motion has required a review of the complicated litigation involving the officers in the state courts. The officers were employed by the New York City Police Department from July 16, 1951 until July 2, 1968 when they were suspended without pay, pending trial of charges pursuant to the Administrative Code of the City of New York, § 434a-20.0. On July 2, 1968, in addition to being suspended from the Police Department, the officers were indicted by a grand jury in New York County, and charged, inter alia, with having con-

spired with other members and ex-members of the New York City Police Department to take unlawful fees in violation of former New York Penal Law §§ 580, 1826. On October 7, 1970, the Acting Police Commissioner concurred in the departmental findings of guilt and dismissed the officers. The officers then instituted a proceeding under Article 78 of the New York C.P.L.R. challenging the Police Commissioner's determination as being, inter alia, arbitrary, and based on evidence obtained in violation of state and federal constitutional and statutory law.

From that point on, the civil and criminal proceedings continued in tandem through the New York courts. On October 19, 1971 one of the officers (Allen) filed in the New York Court of Appeals a notice of appeal from a September 30, 1971 order of the New York Supreme Court, Appellate Division which, inter alia, confirmed the Police Commissioner's determination of October 7, 1970. On February 15, 1974

this appeal was dismissed by the Court of Appeals on the ground that it had not been timely argued or submitted to that court.

In the meantime, the officers had been convicted by the Honorable Harold Birns, after a non-jury trial for conspiracy to take unlawful fees, on November 29, 1972. They received suspended six month prison terms and fines of $250, which were paid.

On February 25, 1974 the Appellate Division in People v. Koutnik, 44 A.D. 2d 48 (1974) held that certain wiretap evidence which had been used in the officers' criminal trial had been illegally obtained and that their convictions, and the convictions of certain other defendants on related charges, had to be vacated and remanded to the New York Supreme Court. In light of its decision in Koutnik, the Appellate Division on June 18, 1974 issued an order which, inter alia, annulled the Police Commissioner's October 7, 1970 determination. On December 5, 1974, however, upon motion by the Commissioner's prede-

cessor, the Appellate Division granted a stay of its June 18, 1974 order pending determination of an appeal by the state regarding defendants other than the officers to the Court of Appeals in People v. Koutnik. On October 23, 1975 the Court of Apeals affirmed the Appellate Division's holding in Koutnik that the use of the wiretap evidence was unlawful. The officers then moved in the Appellate Division to vacate that court's December 5, 1974 stay, and the Police Commissioner moved to vacate that court's June 18, 1974 order. On December 16, 1975 the Appellate Division, without opinion, granted the Police Commissioner's motion and denied the officers' motion. That decision was presumably based upon New York C.P.L.R. 5015(a) which states: "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just on motion of any interested person with such notice as the court may direct upon the ground of: (5) reversal,

modification or vacatur of a prior judgment or order upon which it is based."

The officers then filed in the New York Court of Appeals an appeal as of right from the Appellate Division's December 16, 1975 orders, and raised questions of state and federal constitutional law. On May 3, 1977 the New York Court of Appeals denied plaintiffs' appeal, without opinion. That court's disposition was listed in the New York Reporter under a heading entitled "Appeals on Constitutional Grounds." See 42 N.Y. 2d 823. Following dismissal of their appeal as of right, plaintiffs filed an application for leave to appeal, which was denied on October 6, 1977. See 42 N.Y. 2d 809 (1977).

Here then is a litigation history which established the fundamental merit of the officers' claim, that is, the New York Courts ultimately determined that the use of wiretaps was improper. Notwithstanding that determination, the end result with respect to the officers was to deny them

the relief sought (their reinstatement as police officers). The court has determined, however, that the Commissioner's motion for summary judgment must be granted because plaintiffs' 42 U.S.C. § 1983 action is barred by the statute of limitations. However, the Commissioner's motion for summary judgment on the ground of res judicata is denied for the reasons set forth below.

Statute of Limitations

This action, brought under the federal Civil Rights Act, "is subject to the statute of limitations the state courts would apply in an analogous state action." Meyer v. Frank, 550 F. 2d 726, 728 (2d Cir. 1977), cert. denied, 434 U.S. 830 (1977). Accordingly, the three year New York statute of limitations governs this Section 1983 claim. Id. The only open questions with respect to this issue are, when does the limitations period begin, and is the statute tolled.

The statutory clock began to run on the date of the officer's termination from

the Police Department (October 7, 1970) because that is when the federal causes of action accrued. See Meyer at 728. The officers' assertion that the statute did not begin to run until December, 1975 or until October, 1977[2] is without merit because: "The federal [Section 1983] remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961).

The officers urge that the court adopt Mizell v. North Broward Hospital District, 427 F. 2d 468 (5th Cir. 1970). Under Mizell, a state statute of limitations applicable to a Section 1983 civil rights action is tolled while a potential federal civil rights plaintiff is pursuing state law causes of action in the state courts and state administrative agencies. Under Mizell, such tolling occurs as a matter of federal law, without reliance on a specific tolling statute. See

Williams v. Walsh, 558 F. 2d 667, 673 (2d Cir. 1977). The Second Circuit has in at least two recent cases considered, and failed to adopt the Mizell approach. See Meyer; Williams, supra. As in Meyer, the officers here did not restrict their Article 78 petition to claims grounded in state law. As was the case in Meyer, "[t]his is not a case like Mizell where the prior state court proceeding was directed at obtaining relief through an action grounded solely in state law." 550 F. 2d at 729 (footnote omitted). As the Meyer court stated, "The only thing [plaintiff] has held in reserve has been the federal court itself; federal law has played a principal role all along. The result is that the policy of avoiding federal interference with state affairs survives here in a diluted posture." Id.

Res Judicata

Title 28 of the United States Code, Section 1738, mandates that federal courts

give full faith and credit to judgments entered by state courts of competent jurisdiction. See Mitchell v. National Broadcasting Co., 553 F. 2d 265, 274 (2d Cir. 1977), and cases cited therein.

In spite of the "seeming clarity" of Section 1738, however, a number of Second Circuit cases "have analyzed the issue of the extent to which the prior state court judgment precludes the subsequent Civil Rights Act lawsuit and make no reference whatever to § 1738 or to the concepts of res judicata and collateral estoppel which would be employed by the courts of the state in which the prior judgment was rendered." Winters v. Lavine, 574 F. 2d 46 (2d Cir. 1978), citing, inter alia, Lombard v. Board of Education, 502 F. 2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975). The Winters court noted that cases like Lombard appear to be applying a general federal law of res judicata which is explained by the existence of "'special rules whereby in certain circumstances

state court judgments are accorded perhaps ...a lesser effect by a federal court in a Civil Rights Act case than they would be given by the state courts." 574 F. 2d at 55, quoting McCune v. Frank, 521 F. 2d 1152, 1156 n. 10 (2d Cir. 1975) (emphasis in Winters). The flexibility in this area is reflected in a recent law review article cited in Winters for the proposition that "the decisions of the lower courts teem with inconsistencies." 574 F. 2d at 551, quoting Theis, Res Judicata in Civil Rights Act cases: An Introduction to the Problem, 70 N.W. U. L. Rev. 859, 865 & n. 35 (1976). As noted by the Second Circuit, the problems in this area "apparently exist when "well-defined federal policies, statutory or constitutional,...compete with those policies underlying Section 1738." 574 F. 2d at 55, quoting Mitchell v. National Broadcasting Co., supra, 553 F. 2d 265, 274 (2d Cir. 1977), quoting American Mannex Corp. v. Rozands, 462 F. 2d 688, 690 (5th Cir.), cert. denied,

409 U.S. 1040 (1972). This, indeed, is such a case.

Here the officers did present successfully to the New York courts the constitutional arguments they now assert. There was, however, no final determination on the merits by a New York civil court subsequent to the holding of the Court of Appeals in Koutnik that use of the wiretap evidence was unlawful in the criminal proceeding. See 37 N.Y. 2d at 873. In these circumstances, where the constitutional issue was raised in the state criminal proceeding but not finally litigated (because the Court of Appeals holding that the wiretap evidence was tainted was never considered with respect to the officers' prior convictions), res judicata does not bar their Section 1983 claim. Because of the court's determination concerning the statute of limitations, however, the court may not entertain the action.

Settle judgment on notice within ten days hereof.

IT IS SO ORDERED:

Robert W. Sweet
U.S.D.J.

Dated: New York, New York
April 6, 1979

FOOTNOTES

1/ N.Y. Civ. Prac. Law §214(2) (McKinney's Supp. 1975) includes actions "to recover upon a liability, penalty or forfeiture created or imposed by statute...".

2/ At the very latest, plaintiffs' Section 1983 claims may be said to have accrued in 1974, when the Appellate Division stayed its reinforcement order.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the TWENTY-NINTH day of January, one thousand nine hundred and eighty.

----------x

CHARLES W. LEIGH and LEONARD ALLEN
Plaintiffs-Appellants

v.

ROBERT MCGUIRE, individually and as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the Police Pension Fund, Article II
Defendant-Appellee

79-7479

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge
IRVING R. KAUFMAN

Supreme Court, U. S.
FILED
APR 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1462

ROBERT McGUIRE, individually and as Police Commissioner of the City of New York,

Petitioner,

against

CHARLES W. LEIGH and LEONARD ALLEN,

Respondents.

Respondents' Answer to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

VICTOR J. HERWITZ
Attorney for Respondents
22 East 40th Street
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INDEX

	Page
Opinions Below	1
The Questions Presented	3
Statement of the Case	4
Prior Proceedings in the Federal Courts Below	4
Prior Proceedings in the State Courts	6
Reasons for Denying the Writ . . .	20
1. THE WRIT SHOULD BE DENIED BECAUSE THE ORDER APPEALED FROM IS NOT A FINAL ORDER AND THE CASE IS NOT YET RIPE FOR REVIEW BY THIS COURT	20
2. THE WRIT ALSO SHOULD BE DENIED BECAUSE (A) THE DECISION BELOW WAS PREDICATED ON "THE SPECIAL CIRCUMSTANCES OF THIS CASE"; AND (B) NONE OF THE CIRCUMSTANCES IMPELLING REVIEW ON CERTIORARI PRESCRIBED IN RULE 19 OF THIS COURT IS PRESENT	21
The Special Circumstances Supporting the Tolling of the Statute of Limitations . .	21
The Special Circumstances Supporting the Rejection of the Res Judicata Defense . .	35
3. SINCE PETITIONER'S CONTENTION THAT "§1983 SHOULD NOT BE CONSTRUED AS AUTHORIZING A SUIT OF THE INSTANT SORT" WAS NOT ARGUED IN THE	

INDEX (Cont.) Page

DISTRICT COURT OR CONSIDERED BY THE COURT BELOW, IT IS NOT APPROPRIATE TO BE CONSIDERED BY THIS COURT. 42

CONCLUSION 43

AS NONE OF THE CONSIDERATIONS IMPELLING REVIEW OF CERTIORARI PRESCRIBED IN RULE 19 OF THE RULES OF THIS COURT IS PRESENT, THIS COURT, IN THE EXERCISE OF ITS SOUND DISCRETION, SHOULD DENY THE WRIT. 43

INDEX TO THE APPENDICES

1. Order of the District Court After Remand (Mar. 17, 1980) . . . 1aa

2. Opinion of New York Supreme Court Justice Birns in People v. Trief, 65 Misc 2d 272 (1970). . 4aa

3. Opinion of New York Appellate Division in Article 78 proceedings in Mtr. of Allen v. Murphy and Mtr. of Leigh v. Murphy, 37 AD 2d 117 (1971) 11aa

4. Memorandum opinion of Appellate Division in People v. Trief, 37 AD 2d 553 (1971). 13aa

5. Memorandum opinion of Appellate Division in Mtr. of Allen v. Murphy and Mtr. of Leigh v. Murphy, 37 AD 2d 770 (1971). . . 14aa

6. Memorandum opinion of Appellate Division in People v. Trief, 37 AD 2d 771 (1971). 14aa

INDEX TO APPENDICES (Cont.)

Page

7. Opinion of Appellate Division in People v. Koutnik, et al., 44 AD 2d 48 (1974) 15aa

8. Memorandum opinion of Appellate Division in Mtr. of Allen v. Murphy, and Mtr. of Leigh v. Murphy, 45 AD 2d 693 (1974) 22aa

9. Memorandum opinion of N.Y. Ct. of Appeals in Mtr. of Leigh v. Murphy, 34 NY 2d 935 (1974) . . 24aa

10. Memorandum opinion of N.Y. Ct. of Appeals in People v. Koutnik, et al., 37 NY 2d 873 (1975) 25aa

11. Excerpt from slip opinion no. 576 Sept. 1979 term of 2d Circuit Ct. of Appeals in Quinn v. Syracuse Model Neighborhood Corp. et al. . . 28aa

12. Opinion in Mtr. of Finn's Liquor Shop v. State Liquor Auth., 24 NY 2d 647 (1969). 32aa

TABLE OF AUTHORITIES

	Page(s)
Cases	
1. Allen v. Murphy, 37 AD 2d 117 (1971)	2,9
37 AD 2d 770 (1971)	2
45 AD 2d 693 (1974)	15,16
2. Brotherhood of Locomotive Firemen and Enginemen et al. v. Bangor & Aroostook Railroad Company et al., 389 U.S. 327 (1967)	21
3. Finn v. State Liquor Auth., 24 NY 2d 647 (1969)	3,8-9,39
4. Fuller v. Alaska, 393 U.S. 80 (1968)	8
5. Huffman v. Pursue Ltd., 420 U.S. 592 (1975)	22,23
6. Johnson v. Railway Express Agency, 421 U.S. 454 (1975)	33,41
7. Lee v. Florida, 392 U.S. 378 (1968)	8
8. Leigh v. Murphy, 34 NY 2d 935 (1974)	2,16,39
37 AD 2d 117 (1971)	9
9. Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974, cert. denied)	36
10. Meyer v. Frank, 550 F.2d 726, 729 (2d Cir.) cert. denied 434 U.S. 830 (1977)	22,26
11. People v. Feinlowitz, 29 NY 2d 176 (1971)	10,11

TABLE OF AUTHORITIES (Cont.)

	Page(s)
12. People v. Koutnik, 44 AD 2d 48; aff'd 37 NY 2d 873 (1975)	2 2,13, 14,19
13. People v. Trief, 65 Misc 2d 272; aff'd 37 AD 2d 553; rev'd 37 AD 2d 771 (1971)	2,8,9 10,11
14. Quinn v. Syracuse Model Neighborhood Corp. et al., slip opinion no. 576 of 2d Cir. Ct. of Appeals for Sept. 1979 term	3,26-27
15. Samuels v. Mackell, 401 U.S. 66 (1971)	29
16. Steffel v. Thompson, 415 U.S. 452 (1974)	22
17. Williams v. Walsh, 558 F.2d 667,670 (2d Cir. 1977)	22,26
18. Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978)	36
19. Younger v. Harris, 401 U.S. 37 (1971)	22,23, 29
Statutes and Rules	
42 U.S.C. §1983 (1976)	4,28,31
Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2511 et seq. (1976)	5,10
Federal Communications Act §605	9

TABLE OF AUTHORITIES (Cont.)

	Page(s)
Statutes and Rules (Cont.)	
Fourth Amendment of the U.S. Constitution	5
Fourteenth Amendment of the U.S. Constitution	5
Rule 19 of the Rules of the Supreme Court of the United States	43
New York CPLR 214(2)	25,26
New York CPLR 217	25
New York CPLR Article 78 §7801 . . .	8,28
New York Gen. Mun. Law §50.1	25
New York Pub. Off. Law §30(e)	32

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1462

ROBERT McGUIRE, individually and as Police Commissioner of the City of New York,

Petitioner,

- against -

CHARLES W. LEIGH and LEONARD ALLEN,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The above-named respondents respectfully pray that the writ of certiorari applied for herein be denied.

Opinions Below

Annexed hereto as an appendix is the order of the district court (Sweet,

J.) entered in the case at bar after remand pursuant to the order of the Court of Appeals for the Second Circuit sought to be reviewed herein (Appendix 1; 1aa-3aa).* Also annexed hereto are the following opinions of the New York State courts rendered in the related criminal and Article 78 proceedings in those courts: People v. Trief, 65 Misc 2d 272 (4aa-10aa); aff'd 37 AD 2d 553 (13aa); vacated, reversed and remitted 37 AD 2d 771 (14aa). People v. Koutnik et al., 44 AD 2d 48 (15aa-21aa); aff'd 37 NY 2d 873 (25aa-27aa). Matter of Allen v. Murphy, 37 AD 2d 117 (11aa-13aa); rearg'd and rev'd 37 AD 2d 770 (14aa); prior order vacated, original order reinstated and matter remanded for further proceedings 45 AD 2d 693 (22aa-23aa). Matter of Leigh v. Murphy, 34 NY 2d 935 (24aa). Finally, annexed hereto is a pertinent excerpt from an as yet unreported opinion

*Numbers in parentheses followed by the double letters "aa" refer to the pages of the appendices annexed hereto.

of the United States Court of Appeals, Second Circuit, decided January 8, 1980 in the case of Quinn v. Syracuse Model Neighborhood Corporation, et al., slip opinion no. 576, September term 1979 (28aa-31aa). Also annexed is the opinion in Finn v. State Liquor Authority, 24 NY 2d 647 (1969) (32aa-50aa).

The Questions Presented

1. Since the order sought to be appealed from is an order of the Court of Appeals, Second Circuit, which (a) reversed an order and judgment of the district court granting petitioner-defendant's motion for summary judgment dismissing the complaint and (b) remanded the case to the district court for further proceedings where it is now pending, is the order sought to be reviewed ripe for review?

2. Since the decision below was predicated on "the special circumstances of

this case," and none of the considerations impelling review on certiorari prescribed in Rule 19 of the rules of this Court is present, should this court, in the exercise of its sound discretion, grant the writ?

Statement of the Case

Prior Proceedings in the Federal Courts Below

Respondents Charles W. Leigh and Leonard Allen, two former police officers who were discharged from the New York City Police Department in October 1970, commenced the instant action in the United States Court for the Southern District of New York on May 12, 1978, pursuant to 42 U.S.C. Section 1983 (1976), seeking to vacate and annul their dismissal from the force (2a, 4a).* The basis of their action was that the use of illegally obtained wiretap evidence against them in the Police Department proceedings which led to their dismissal violated their rights under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Section 2511 et seq. (1976), and under the Fourth and Fourteenth Amendments (2a).

*Numbers in parentheses followed by "a" refer to the pages of the appendices annexed to the petition for certiorari filed herein.

The district court, in an opinion filed April 6, 1979 (468 F. Supp. 1163; 11a-24a), granted summary judgment for petitioner Police Commissioner, ruling that the action was barred by the applicable New York three-year statute of limitations but would not have been barred by res judicata (2a-3a).

The Court of Appeals for the Second Circuit, on December 19, 1979 reversed the judgment of the district court and remanded the case to that court (10a), holding that the action was neither time-barred nor barred by res judicata (3a; 10a).

After remand to the district court, that court entered an order on March 17, 1980, in which it ordered (1) that its previous order granting defendant's motion for summary judgment dismissing the action be vacated and denied; (2) that plaintiffs' cross-motion

for summary judgment be granted to the extent of striking defendant's affirmative defenses of statute of limitations and res judicata; and (3) that the court retain jurisdiction of the action for any further proceedings it might deem necessary (2aa-3aa).

Prior Proceedings in the State Courts

On July 2, 1968 respondents, who had been members of the Police Department since 1951, were indicted by a state grand jury in New York County, charged, inter alia, with having conspired with other members and former members of the New York City Police Department and others to take unlawful fees in violation of Penal Law Sections 580 and 1826 (JA 16).* Because of that indictment respondents were immediately suspended without pay pending trial of charges by the then

*Numbers in parentheses preceded by the capital letters "JA" refer to pages of the Joint Appendix submitted to the court below.

Police Commissioner (JA 15-16), and, on July 30, 1968, Police Department charges accusing them of the same conspiracy as was alleged in the indictment were preferred against them (JA 16).

In September 1970, respondents were brought to trial in the Police Department on the Police Department charges (JA 16). Although there was other evidence admitted, the principal evidence adduced against them at that trial which purportedly supported the charges was wiretap evidence obtained between June 1963 and January 1964, pursuant to five of more than 100 wiretap orders signed by Justices of the Supreme Court in New York County between October 1960 and June 1964 (JA 16). This evidence was admitted over respondents' objections that such evidence had been obtained in violation of state and federal statutory and constitutional provisions, including the Fourth and Fourteenth Amendments of the United States Constitution and Section 605 of the Federal Communications Act, and

further, that it had been ruled in the companion criminal case* that the use of said wiretap evidence would be barred therein under Section 605 of the Federal Communications Act, as construed by the Supreme Court of the United States in Lee v. Florida, 392 US 378 and Fuller v. Alaska, 393 US 80 (JA 16-17). Yet, on the basis of this wiretap evidence, respondents, on October 7, 1970, were found guilty of the charges preferred against them and dismissed from their positions by the then Acting Police Commissioner (JA 17).

Respondents then commenced an Article 78 proceeding, N.Y. Civ. Prac. Law Section 7801 (McKinney 1963), alleging, inter alia, that their dismissals were based on evidence obtained by means of illegal wiretaps (4a) and the People took an appeal from the suppression order entered, as aforesaid, in the criminal proceeding (JA 33). "From this point on," as stated in the opinion below,

*Sub nom. People v. Trief, 65 Misc 2d 272, 317 NYS 2d 525 (1970); (4aa-10aa).

"[respondents'] Article 78 and criminal proceedings progressed 'in tandem' through the New York courts" (4a).

The respondents' aforesaid Article 78 proceeding was transferred to the New York State Appellate Division of the Supreme Court in the First Judicial Department, the same court to which the People had taken their appeal from the suppression order entered in the criminal proceeding (JA 33). That court considered these cases in conjunction with each other and decided them together on June 29, 1971 (JA 33; Matter of Allen and Matter of Leigh, 37 AD 2d 117; (11aa-13aa). People v. Trief, 37 AD 2d 553). It affirmed the order in the criminal proceeding which had granted suppression with respect to the wiretap evidence on the ground that it had been obtained in violation of Section 605 of the Federal Communications Act (JA 33). People v. Trief, supra, 37 AD 2d 553 affg. 65 Misc 2d 272, 317 NYS 2d 525. Accordingly in the Article 78 proceeding (citing People v. Trief, supra, and Matter of Finn's Liquor Shop v.

State Liquor Authority, 24 NY 2d 647, 301 NY 2d 584, 249 NE 2d 440, it similarly held that the wiretap evidence should not have been considered at respondents' departmental trial (13aa). It therefore annulled the Police Commissioner's guilty determinations and remanded the matters to him for further proceedings to determine whether "the evidence not subject to the restriction heretofore indicated might, when separately considered, warrant a similar (guilty) determinaion . . ." (11aa-13aa)

Subsequently, the Court of Appeals in People v. Feinlowitz, 29 NY 2d 176, held in effect, that the Omnibus Crime Control and Safe Streets Act of 1968 (USC Section 2511 et seq.) sanctioned the use of evidence obtained pursuant to wiretaps authorized prior to its effective date so long as there was substantial compliance with the provisions of that Act (22aa). A motion for reargument was thereupon granted in the Appellate Division in People v. Trief, et al., 37 AD 2d 771,

and upon reargument, the order granting suppression was reversed, the motion was denied and the matter was remitted for consideration of "the validity of the specific wiretap orders in question, taking into account the affidavits upon which they were based and the procedure followed in obtaining them." People v. Trief, et al., supra (14aa). Based in part upon such reversal and the denial of the motion to suppress and further, upon the initial conclusion that the evidence would be admissible upon the standards enunciated in People v. Feinlowitz, supra, the orders entered June 29, 1971 in the Article 78 proceeding were vacated and by orders of the Appellate Division entered September 30, 1971, the Police Commissioner's determinations were confirmed. 37 AD 2d 770; (14aa). From the latter orders, respondents on October 19, 1971 filed a Notice of Appeal to the New York State Court of Appeals (JA 49).

Pursuant to the remand order in the criminal action (People v. Trief, supra), a suppression hearing was held and it was deter-

mined by the trial court that the wiretap orders were properly issued, accordingly suppression was denied (JA 35). Following denial of the motion to suppress, various of the defendants in the criminal action, but not the respondents herein, pleaded guilty to conspiracy to commit the crime of taking unlawful fees (17aa). Respondents, however, proceeded to trial without a jury on a stipulated trial record consisting, inter alia, of the transcript of their police departmental trial and exhibits introduced there (17aa). Among the evidence included in that stipulation (subject to a continuing objection to their admissibility) were the same wiretap recorded conversations which had been admitted in evidence over respondents' objections at their departmental trial (JA 26; 35). Respondents were convicted of the same charge as the other defendants who had pleaded guilty and they received suspended 6-month terms of imprisonment and $250 fines or 6 months imprisonment; the fines were paid (JA 26).

All of the defendants in the criminal action, including these respondents, appealed the judgments of conviction and upon appeal the Appellate Division of the Supreme Court, First Department, held on February 25, 1974 that the wiretap orders were improperly issued since the affidavits submitted in support of the applications for them "failed to meet even the stricken standards of Section 913-a of the Code of Criminal Procedure," and the motion to suppress was therefore granted (21aa); People v. Koutnik, 44 AD 2d 48).

As to these respondents, the Appellate Division also held that none of the evidence in the case sustained the charge of conspiracy to commit the crime of taking unlawful fees "as there is no evidence at all in the record of any agreement to take money, a request for money, a conversation or discussion concerning the passing of money or the actual passing of money. This element of the crime has not been proven." (18aa) The convictions of respondents were vacated as were the convictions of the other defendants in the

criminal action (21aa). The People took no appeal as to respondents from the Appellate Division decision in People v. Koutnik. It did, however, obtain leave to appeal to the New York State Court of Appeals as to the other defendants (25aa).

While the criminal action was pending in the Appellate Division and ten days before the latter court rendered its decision in People v. Koutnik, the Court of Appeals on February 15, 1974 dismissed the appeal of the respondent Allen* which, as stated above, he had taken from the decision of the Appellate Division entered September 30, 1971 confirming the Police Commissioner's determination dismissing him from the police force (JA 5).

In view of the Appellate Division's holding in the criminal case that the wiretap evidence had been obtained illegally and was inadmissible, respondents moved in the Appellate Division to vacate that court's September 30, 1971 order confirming their dismissal (22aa).

*For failure to perfect, argue or submit within 9 months as provided by the rules of the Court of Appeals (JA 49).

The Appellate Division granted respondents' motion in a memorandum opinion dated June 18, 1974 (22aa; 45 AD 2d 693). In that opinion, after setting forth the prior history of the Article 78 and criminal proceedings, the court said this (23aa; 45 AD 2d at 694):

> . . . It is not disputed that the wiretap orders which this court found invalid in People v. Koutnik (supra), included the very same orders involved in the police departmental hearings and that the evidence offered at those hearings emanated, at least in part, from execution of those orders. Throughout these entire proceedings this court has considered the criminal and article 78 proceedings together in an attempt to achieve a uniform and just result. It is apparent that the orders of this court entered September 30, 1971 which confirmed the respondent's determinations were based in substantial part upon the decision in People v. Trief (supra), wherein the order granting suppression was reversed and the motion denied. Subsequently, when this court decided in People v. Koutnik (supra) that the wiretap orders were improperly issued and that the motions to suppress should have been granted, the very foundation for the orders entered September 30, 1971 was removed. (Cf. Feldberg v. Howard Fulton St., 44 Misc 2d 218, affd. 24 AD 2d 704, affd. 16 NY 2d 1041.) Accordingly, pursuant to CPLR 5015 (subd. [a], par. 5) which provides that a "court which rendered a judgment or order may relieve a party from it * * * upon the ground of * * * reversal, modification

or vacatur of a prior judgment or order upon which it is based", and upon the inherent power of the court to vacate its own orders in the interest of justice (see McCarthy v. Port of N.Y. Auth., 21 AD 2d 125; 5 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 5015.12), the motion is granted, the orders entered September 30, 1971 are vacated and the orders entered June 29, 1971 are reinstated to the extent of annulling the respondent's determinations and the matter remanded for further proceedings consistent herewith. (Emphasis supplied.)

Upon being informed of the Appellate Division's aforesaid order of June 18, 1974, the New York Court of Appeals on its own motion dismissed "for mootness" respondent Leigh's appeal from the Appellate Division's decision of September 30, 1971 which confirmed the determination of the Police Commissioner dismissing Leigh from his position. Leigh v. Murphy, 34 NY 2d 935; 359 NY 2d 559; 316 NE 2d 874; 24aa.

On November 8, 1974, in a letter addressed to respondents' counsel, the Deputy Police Commissioner for trials stated the Police Department's then position with respect to the issues that had been raised. Set forth

below is what he said in pertinent part (JA 38-40):

> The pending and outstanding court order affecting Leigh and Allen was entered on June 18, 1974 by the Appellate Division. That order was based upon the decision in People v. Koutnik, 44 A.D. 2d 48. The Koutnik matter, to which the Police Department is not a party, has not resulted in a final decision to the extent that the Manhattan District Attorney's Office has appealed the Koutnik decision to the Court of Appeals. Until this appeal is heard and decided, Leigh's and Allen's final status with the Police Department cannot be determined. The Police Department recognizes its obligation to act in accordance with the pending order of June 18, 1974. Consequently the Police Commissioner ordered on November 7, 1974 that the dismissal from the Police Department of Leigh and Allen be annulled and that these two officers be returned to the rolls of the Police Department and placed on suspension. It is the intention of the Police Department to retain Leigh and Allen in the aforementioned category until the Court of Appeals Koutnik decision has been entered. While on suspension, Leigh and Allen may apply for a waiver of the rule that requires them to report periodically to their resident precinct.
>
> You requested that the Police Department determine the nature and extent of the evidence it had to offer to prove the charges that have been served on Leigh and Allen. You are herewith advised that the evidence the Police Department would offer to establish these allegations is the same evidence offered in the prior trial which the Appellate Division decision

in People v. Koutnik, supra, found to be tainted by virtue of illegal wiretaps. The Police Department contends that the Koutnik decision erred in ascribing a taint to the evidence that substantiated the departmental convictions. This is the precise issue that is being raised before the Court of Appeals. In the event the Court of Appeals reverses, remands or modifies the Appellate Division decision, the Police Department may have grounds, under the authority of McCarthy v. Port of New York Authority, 21 A.D. 2d 125, 127-128 (1964), CPLR 5015, and other pertinent provisions of law, to seek reversal, modification or vacatur of the order entered June 18, 1974.

After being restored to duty on November 7, 1974, as stated in the letter quoted above, respondents filed retirement applications on November 15, and 18, 1974, to take effect 30 days thereafter (JA 21). To prevent their retirement, the then Police Commissioner moved for and on December 5, 1974 obtained from the Appellate Diviison a stay of its June 18, 1974 order which had annulled the prior orders dismissing respondents from their positions (JA 21). The stay provided that it was to remain in effect until the Court of Appeals of the State of New York

had rendered its decision in the then pending appeal in People v. Koutnik (JA 21). On October 23, 1975 the Court of Appeals affirmed the Appellate Division decision in People v. Koutnik (25aa-27aa; 37 NY 873). Nonetheless, the Police Commissioner refused to reinstate respondents (JA 21).

The respondents then made a motion in the Appelate Division to have it vacate its previous stay and the then Police Commissioner made a cross-motion to vacate the Appellate Division's June 18, 1974 order (JA 22). On December 16, 1975, the Appellate Division, without opinion, granted the Police Commissioner's motion to vacate its June 18, 1974 order and denied as academic respondents' motion to vacate that stay (JA 22). On May 3, 1977 the New York Court of Appeals dismissed respondents' appeal from the Appellate Division order on the ground that the appeal did not directly involve a constitutional question (JA 22; 42 NY 2d 823). Respondents' subsequent motion for leave to appeal was denied on October 6,

1977 (JA 22; 42 NY 2d 809). Seven months later on May 12, 1978 respondents commenced the instant action in the district court for the Southern District of New York (JA 22).

REASONS FOR DENYING THE WRIT

1. THE WRIT SHOULD BE DENIED BECAUSE THE ORDER APPEALED FROM IS NOT A FINAL ORDER AND THE CASE IS NOT YET RIPE FOR REVIEW BY THIS COURT.

The first reason for denying the petition for certiorari is that the order sought to be reviewed is not a final order. Based on the order of the Court of Appeals, the district court to which the case was remanded, has not entered a final order, it has merely (1) vacated its prior order granting petitioner-defendant's motion for Summary Judgment dismissing the action; (2) struck petitioner-defendant's affirmative defenses of statute of limitations and res judicata; and (3) retained jurisdiction of the action for such further proceedings it might deem necessary (2aa-3aa). As the order appealed

from is not final, it is respectfully submitted that "it is not yet ripe for review by this court." Brotherhood of Locomotive Firemen and Enginemen et al., v. Bangor & Aroostook Railrod Company et al., 389 US 327, 19 L Ed 2d 560, 88 S Ct 437 (1967).

2. THE WRIT ALSO SHOULD BE DENIED BECAUSE (A) THE DECISION BELOW WAS PREDICATED ON "THE SPECIAL CIRCUMSTANCES OF THIS CASE"; AND (B) NONE OF THE CONSIDERATIONS IMPELLING REVIEW ON CERTIORARI PRESCRIBED IN RULE 19 OF THIS COURT IS PRESENT.

The Special Circumstances Supporting the Tolling of the Statute of Limitations

Judge Timbers, in the final paragraph of his opinion for the court below, stated as follows (10a):

> To summarize: we hold, under the special circumstances of this case, that federalism considerations support the tolling of the statute of limitations governing the §1983 action during the pendency of the interrelated state criminal and Article 78 proceedings; and that the policies of repose underlying the statute of limitations will not be adversely affected by such tolling. We therefore reverse the holding of the district court that appellants' §1983 action is time-barred. (Emphasis supplied)

The federalism considerations which he referred to were stated in his opinion, as follows (8a-9a):

> The fact that appellants' federal claims were raised in criminal proceedings and in the Article 78 proceeding closely tied to the criminal proceedings distinguishes this case from Meyer* and Williams.** Unlike in Meyer and Williams, appellants here did not "choose" the state forum to litigate their federal claims while holding the federal forum "in reserve." Meyer v. Frank, supra, 550 F.2d at 729. Appellants were forced to raise their constitutional claims as a defense in their state trial. Moreover, the interrelationship of the criminal and civil actions at the state level provides strong support for the conclusion that the statute of limitations should be tolled here. Federal courts must be particularly wary of interfering with the functions of state courts when state criminal proceedings are involved. See generally Younger v. Harris, 401 U.S. 37 (1971); Steffel v. Thompson, 415 U.S. 452 (1974); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Interests of federalism, therefore, favored the deferral of the federal action here until the issues all were finally resolved in the state criminal proceedings,

*Meyer v. Frank, 550 F.2d 726, 729 (2d Cir.), cert. denied 434 U.S. 830 (1977).

**Williams v. Walsh, 558 F.2d 667, 670 (2d Cir. 1977).

including two levels of appeals.

By tolling the statute of limitations during the pendency of appellants' Article 78 proceeding and the criminal appeals involving the issue of wiretap illegality, we are able to comply with the Younger rule that federal courts should "vindicate and protect federal rights and federal interests . . . in ways that will not unduly interfere with the legitimate activities of the States." Huffman v. Pursue, Ltd., supra, 420 U.S. at 601 (quoting Younger v. Harris, supra, 401 U.S. at 44). Tolling here permits the federal courts to show the "proper respect for state functions", Younger v. Harris, supra, 401 U.S. at 44, by permitting final resolution of issues in state criminal appeals, while at the same time enabling us to preserve the right of appellants to vindicate their federal claims under §1983.

After concluding that the remedial policy of §1983 and considerations of federalism support tolling in this case, Judge Timbers then turned in his opinion to "a consideration of the policies served by strict application of the three-year statute of limitations" and in that connection he stated as follows (9a):

> Strict enforcement of statutes of limitations protects defendants who have been "lulled" into a state of repose by plaintiffs who have "slept on

their rights". See Meyer v. Frank, supra, 550 F.2d at 730. In the instant case, however, appellants were diligent in the pursuit of their claims, having raised the federal issues in the state courts almost immediately after their discharge from the police force. By no means can they be regarded as having "slept" on their rights. Likewise, appellants did not "lull" appellee into believing that the federal issues underlying the §1983 claims would never be raised. The precise issues involving wiretap illegality that form the basis of the §1983 action were hotly contested throughout the state proceedings.[fn] Thus, the policies traditionally served by strict enforcement of the statute of limitations will not be frustrated by tolling in this case.

[fn] It may be noted further that the state court records have preserved most of the relevant evidence in this case. The federal court therefore is not faced with the prospect of adjudicating "stale" claims.

In his petition in this court petitioner advances four reasons why he contends that the court below erred in its holding with respect to petitioner's claim that the action was time barred. Respondents' answers to petitioner's arguments are set forth below.

(1)

Petitioner in his petition herein (pp. 24-25) contends that the court below erroneously held that New York's CPLR 214(2) -- which prescribes a three year period of limitations for actions "to recover upon a liability . . . created or imposed by statute" -- is the most appropriate statute of limitations in a §1983 action in New York. Petitioner contends that the most appropriate New York statute of limitations applicable in this case is CPLR 217 which prescribes a period of limitations of four months in a proceeding to review a determination of an administrative body and that the next appropriate statute is New York General Municipal Law §50-i which prescribes a period of limitations of one year and 90 days.

The aforesaid contentions now urged by petitioner in this court were not urged in the courts below. As a matter

of fact, in the district court petitioner, in his brief in support of his motion for summary judgment, said this at p. 12:

> It is well settled that an action brought under the Civil Rights Act is subject to the statute of limitations that a state would apply in an analogous state action. Williams v. Walsh, 558 F.2d 667,670 (2d Cir. 1977); Meyer v. Frank, 550 F.2d 726,728 (2d Cir. 1977). Thus, the present action is governed by New York's three year statute of limitations.[fn] Meyer v. Frank, supra, 550 F.2d 728.
>
> [fn] N.Y. Civ. Prac. Law, sec. 214(2) (McKinney Supp. 1975) includes actions "to recover upon a liability, penalty or forfeiture created or imposed by statute . . .

Since petitioner maintained in the courts below that the three year statute of limitations prescribed in CPLR 214(2) was the one applicable in this case, it would be inappropriate, to say the least, for this court to grant certiorari to review this alleged question. In any event, the Second Circuit recently, on January 8, 1980, in the case of Quinn

v. Syracuse Model Neighborhood Corp. et al. (slip opinion No. 576-Sept. Term) again held "that the [CPLR] §214(2) limitations periods govern suits under §1983 regardless of the legal status of the defendant under New York law." Pages 844-846 of that opinion setting forth the court's holding and reasoning is set forth in the respondents' appendix herein at pages 29aa-31aa.

In light of the foregoing it is respectfully submitted that the Second Circuit's long standing rule that in §1983 actions New York's CPLR §214(2) three year statute of limitations is applicable is correct and does not merit review by this court under its rules and past policy.

(2)

In petitioner's petition herein at pp. 25-29 he argues (1) that the pendency of a criminal prosecution at the

time respondents were dismissed from their positions in October 1970, was no bar to their commencing a §1983 action in the federal court attacking their dismissals; (2) that the commencement of such an action would not have impinged upon principles of "federalism", and, therefore, (3) that the court below erred in holding that "under the special circumstances of this case . . . federalism considerations support the tolling of the statute of limitations governing §1983 actions during the pendency of the interrelated state criminal and Article 78 proceedings.

Of course, as petitioner says, the pendency of the criminal prosecution at the time respondents were dismissed from their positions in October 1970 was no bar to respondents commencing a §1983 action in the federal court attacking their dismissals.

But a judgment in that action, whether it was a finding that the wiretap

evidence adduced at the departmental trial had been illegally obtained and improperly admitted into evidence, or the reverse of such finding -- would necessarily affect, if not induce, a similar finding in the state criminal prosecution where the identical legal and constitutional issues were presented.

A judgment one way or the other in the §1983 action would be tantamount to obtaining a declaratory judgment which inevitably would affect or be precisely followed in the state criminal prosecution.

In the case of Samuels v. Mackell, 401 US 66, decided by this court on February 23, 1971, simultaneously with its decision in Younger v. Harris, 401 US 37, this court said at pages 68-69:

> In No. 2, Younger v. Harris, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746, we today decided on facts very similar to the facts in these cases that a United States District Court could not issue an injunction to stay proceedings pending in a state criminal court at the time the fed-

eral suit was begun. This was because it did not appear from the record that the plaintiffs would suffer immediate irreparable injury in accord with the rule set out in Douglas v. City of Jeannette, 319 US 157, 87 L Ed 1324, 63 S Ct 877 (1943), and many other cases. Since in the present case there is likewise no sufficient showing in the record that the plaintiffs have suffered or would suffer irreparable injury, our decision in the Younger case is dispositive of the prayers for injunctions here. The plaintiffs in the present cases also included in their complaints an alternative prayer for a declaratory judgment, but for the reasons indicated below, we hold that this alternative prayer does not require a different result, and that under the circumstances of these cases, the plaintiffs were not entitled to federal relief, declaratory or injunctive . . .

This court then said at page 72:

. . . [I]n cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. In both situations deeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that

the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting "[f]urther necessary or proper relief," 28 USC §2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to "protect or effectuate" the declaratory judgment, 28 USC §2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would. . .

It would have been futile and pointless for these respondents to have commenced a §1983 action in the federal courts while the criminal prosecution was pending in the state courts unless they were to seek in the §1983 action either an injunction against the criminal prosecution or a declaratory judgment as a prelude to seeking an injunction. This is so because a conviction of the respondents

in the criminal prosecution of the crime charged -- conspiracy to accept bribes from gamblers (4a) -- would have automatically resulted in the forfeiture of their offices because under New York Public Offices Law §30 it is provided in pertinent part as follows:

> 1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof . . .
> (e) his conviction of . . . a crime involving a violation of his oath of office . . . (McKinney's Public Offices Law §30).

In the light of the foregoing it is respectfully submitted that the court below was correct in holding "that federalism considerations support the tolling of the statute of limitations governing the §1983 action during the pendency of the interrelated state criminal and Article 78 proceeding . . ." (9a)

(3)

In his petition, at pages 29-30, petitioner states as follows:

The decision to toll the borrowed state statute of limitations is in conflict with the decisions of other circuit courts, because while the court expressed "no doubt that a federal court has the power to toll borrowed statutes of limitations in §1983 actions" (6a) (but cf., Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315, 319 [1st Cir., 1978]), it omitted the corollary to that purported rule that federal courts should apply the state's laws on tolling in addition to the limitations period itself. See, Ammlung v. City of Chester, 494 F.2d 811, 815 (3d Cir., 1974), citing Duncan v. Nelson, 466 F.2d 939, 941 (7th Cir., 1972), cert. den., 409 U.S. 894 (1972), and Jones v. Bombeck, 375 F.2d 737, 738-739 (3d Cir., 1962). Cf., Blair v. Page Aircraft Maintenance, Inc., 467 F.2d 815, 821 (Tuttle, C.J., concurring and dissenting.

In Johnson v. Railway Express Agency, 421 US 454 (1975) (the very case relied upon by petitioner in support of his above-stated contention), this court at page 465 said as follows:

> Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide. As the Court noted in Auto Workers v. Hoosier Corp. 383 US, at 706-707, 16 L Ed 2d 192, 86 S Ct 1107, considerations of state

law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration.

Furthermore, the action of the court below in tolling the statute of limitations did not contravene any New York tolling statute or violate any of that state's laws or policies appertaining thereto.

(4)

Finally, petitioner would have this court review the findings of the court below that respondents "were diligent in the pursuit of their claims" and "[b]y no means can they be regarded as having 'slept' on their rights." Nor did they "'lull [petitioner] into believing that the federal issues underlying the §1983 claims would never be raised." (9a)

The undersigned, who has represented these respondents in every trial

and appellate court in the State of New York in both their criminal and Article 78 proceedings for the past nearly 12 years, cannot imagine how he could have been more diligent and more devoted to the pursuit of his clients' claims than he has been in the case at bar. In any event, it would hardly be consonant with the rules and past policy of this Court to review such findings, essentially factual, of the Courts below.

In light of the foregoing, it is respectfully submitted that the holding of the Court below that respondents' §1983 action was not time-barred was correct.

The Special Circumstances Supporting The Rejection Of The Res Judicata Defense

In a footnote to his opinion in the court below, Judge Timbers briefly discussed petitioner's res judicata claim and expressed the court's reasons for

rejecting them as follows (3a):

> Although the district court dismissed the complaint as time-barred, it also held that the action would not have been barred by res judicata. We agree with the district court's conclusion in that respect, and therefore affirm on that issue.
>
> Although appellants' discharges ultimately were upheld by the New York courts in an Article 78 proceeding, that decision was the result of an apparent procedural ruling. In no sense could appellees be regarded as having lost on the merits of the issues which formed the basis of their instant §1983 action. On the contrary, the state court decision in People v. Koutnik, 44 A.D. 2d 48, 353 N.Y.S. 2d 197 (1st Dept. 1974), aff'd. 37 N.Y. 2d 873, 340 N.E. 2d 727, 378 N.Y.S. 2d 360 (1975), vindicated appellants' claims of wiretap illegality.
>
> Therefore, in view of the fact that appellants presented their federal claims successfully to the New York courts, and were not denied relief because they lost on the merits of those issues, we believe that the district court was correct in ruling that res judicata would not bar the §1983 action. See Winters v. Lavine, 574 F.2d 46 (2 Cir. 1978); Lombard v. Board of Education, 502 F.2d 631 (2 Cir. 1974), cert. denied, 420 U.S. 976 (1975).

Judge Timbers, in his opinion in the court below, said that the result of the state court proceedings had been "incongruous" (5a). Here is how he put it:

> The final result of the extensive proceedings in the state courts was that appellants succeeded in establishing their claims of constitutional violations, and yet were denied relief. In an effort to correct this incongruous result, appellants commenced the instant §1983 action to obtain the relief which had been denied them at the state level.

It cannot be denied that the result of the proceedings of the state court was "incongruous". The following facts, as set forth in the opinion below, establish its incongruity (5a):

> In October 1975 the New York Court of Appeals affirmed the Appellate Division's ruling in Koutnik that the wiretap evidence had been illegally obtained. Since the Court of Appeals decision ostensibly settled once and for all that the wiretap evidence against appellants -- the basis for the bribery charges in both the departmental and the criminal proceedings --

had been obtained illegally and hence was inadmissible, appellants sought appropriate final relief in their Article 78 proceeding. They therefore moved in the Appellate Division to vacate the stay of the June 18, 1974 order which had annulled their dismissals from the police force. In December 1975, however, the Appellate Division, without opinion, denied appellants' motion and instead granted the motion of the Police Commissioner to vacate the June 18, 1974 order of annulment.[fn]

[fn]The reasoning behind the Appellate Division's refusal to grant appellants' request for ultimate relief is unclear. Presumably it reflected the court's view that, for procedural reasons, the Appellate Division should not upset its original ruling in the case.

Whatever the reasons may have been which impelled the Appellate Division to vacate its June 18, 1974 order annulling respondents' dismissal from their positions, it could not have been on the merits. As the New York Court of Appeals is the highest court in the State of New York, the Appellate Division was bound to accept its finding in Koutnik that the wiretap evidence had been illegally obtained and was inadmissible, in

the criminal case and under New York State law inadmissible also in the police departmental proceeding. Matter of Finn's Liquor Store v. State Liquor Authority, 24 NY 2d 647, 660-661. A copy of the majority opinion in that case as well as the dissenting opinion is annexed as an appendix to this answer (32aa-50aa).

Petitioner's contention in this court that the action of the Appellate Division in vacating its June 18, 1974 order was based upon the dismissals by the New York Court of Appeals of respondents' appeals to that court for failure to prosecute is contrary to the record. As stated above, the appeal of petitioner Leigh to the New York Court of Appeals was dismissed not for failure to prosecute but for mootness. See Leigh v. Murphy, 34 NY 2d 935 (24aa). Since the Article 78 proceedings in the state courts were treated identically in the Appellate Division, there is no reason to believe that the action of the Appellate Division

in vacating its order of June 18, 1974 was different as to each respondent. Since the Appellate Division's action as to respondent Leigh could not have been based on his failure to prosecute his appeal to the Court of Appeals, it cannot be presumed that the Appellate Division's action in vacating its June 18, 1974 order as to respondent Allen was based on the dismissal of his appeal to the Court of Appeals for failure to prosecute.

When the Appellate Division on June 18, 9174 vacated its prior order and annulled the Police Commissioner's determination, it had been apprised of the fact that on February 15, 1974 respondent Allen's appeal to the Court of Appeals had been dismissed. Despite that, in its June 18, 1974 opinion, the Appellate Division annulled its previous determination confirming the dismissals of petitioners from their positions and it stated that it was doing so "in the interest of justice" (23aa). If it was in the interest of justice for the Appellate Divi-

sion to vacate its prior order and reinstate respondents to their positions on June 18, 1974, it certainly should have been in the interest of justice to continue to order respondents' reinstatement to their positions after the New York Court of Appeals in Koutnik had affirmed the Appellate Division's decision and had held that the wiretap evidence had been obtained illegally and was inadmissible.

No case cited by petitioner in his brief in this court has held that a civil rights action is barred in the federal court by principles of res judicata when a state court has held on the merits that the plaintiffs' constitutional and civil rights have been violated, and the state, contrary to its own expressed idea of justice, refuses to grant relief. Again we cite and quote from this court's decision in Johnson v. Railway Express Agency, supra, 421 US 454 wherein this court said at p. 465 as follows:

> Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide. As the Court noted in Auto Workers v. Hoosier Corp. 383 US, at 706-707, 16 L Ed 2d 192, 86 S Ct 1107, considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration.

In light of the foregoing, it is respectfully submitted that the holding of the court below, that respondents' §1983 action was not barred by res judicata, was correct.

3. SINCE PETITIONER'S CONTENTION THAT "§1983 SHOULD NOT BE CONSTRUED AS AUTHORIZING A SUIT OF THE INSTANT SORT" WAS NOT ARGUED IN THE DISTRICT COURT OR CONSIDERED BY THAT COURT OR THE COURT BELOW, IT IS NOT APPROPRIATE TO BE CONSIDERED BY THIS COURT.

In his petition herein, pages 33-36, petitioner argues that "§1983 should not be construed as authorizing a suit of the instant sort." It is respect-

fully submitted that that question is not appropriate for review by this court because in the district court petitioner's motion for summary judgment was made solely on statute of limitations and res judicata grounds and therefore only those grounds were considered by the district court or the court below.

CONCLUSION

AS NONE OF THE CONSIDERATIONS IMPELLING REVIEW BY CERTIORARI PRESCRIBED IN RULE 19 OF THE RULES OF THIS COURT IS PRESENT, THIS COURT, IN THE EXERCISE OF ITS SOUND DISCRETION, SHOULD DENY THE WRIT.

Dated: April 11, 1980
New York, N.Y.

Respectfully submitted,

VICTOR J. HERWITZ
Attorney for respondents

APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES W. LEIGH and LEONARD ALLEN,	:	
Plaintiffs,	:	
- against -	:	ORDER
ROBERT McGUIRE, individually and as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the Police Pension Fund, Article II,	:	78 Civ. 2210 (RWS)
Defendant.	:	

WHEREAS, plaintiffs, Charles W. Leigh and Leonard Allen, two former New York City police officers who were discharged from their positions on October 7, 1970, commenced the instant action in this Court on May 12, 1978 pursuant to 42 U.S.C. Section 1983 (1976) seeking, inter alia, to vacate and annul their dismissal from the force claiming that the use of illegally obtained wiretap evidence against them in the Police Department proceeding violated their rights under the Omnibus Crime Control and Safe Streets Act of 1968,

18 U.S.C. Section 2511 et seq. (1976) and under the Fourth and Fourteenth Amendments; and

WHEREAS, the defendant, Robert McGuire, individually and as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the Police Pension Fund, Article II, made a motion in this Court pursuant to Federal Rules of Civil Procedure Section 56 for Summary Judgment dismissing the action on the grounds that the action was barred (1) by the applicable New York three-year statute of limitations; and (2) by res judicata, and plaintiffs made a cross-motion to strike said defenses and for Summary Judgment; and

WHEREAS, on June 28, 1979 an order was entered in this Court granting defendant's motion for Summary Judgment dismissing plaintiffs' action on the ground that it was barred by the Statute of Limitations but not by res judicata; and

WHEREAS, plaintiffs appealed from

the aforesaid order and the judgment entered thereon to the United States Court of Appeals for the Second Circuit and the latter Court, on December 19, 1979 rendered its decision reversing said judgment and remanding the case to this Court for further proceedings; now, therefore, it is

ORDERED (1) that the order of this Court entered June 28, 1979 and the judgment entered thereon granting defendant's motion for Summary Judgment dismissing the action is hereby vacated and defendant's said motion for Summary Judgment is denied and (2) plaintiffs' cross-motion for Summary Judgment is granted to the extent of striking defendant's affirmative defenses of statute of limitations and res judicata and (3) jurisdiction of this action is hereby retained for any further proceedings the Court may deem necessary.

Dated: New York, New York
March 17, 1980

(Signature of Robert W. Sweet U.S.D.J.)

ROBERT W. SWEET
U.S.D.J.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. GEORGE TRIEF, Defendant.

Supreme Court, Trial Term, New York County, December 9, 1970.

Crimes — wiretapping and bugging — evidence which police obtained, pursuant to court orders, by tapping telephone wires, is inadmissible and is ordered suppressed — but evidence which police obtained by electronic "bugging" in 1960 to 1965 will not be suppressed if affidavits and ex parte orders met standards of that time — 2½ years' delay without trial, thus far, has been occasioned by defendant's pretrial motions, hence defendant's motion to dismiss indictment is denied.

1. Pursuant to ex parte court orders under former section 813-a of the Code of Criminal Procedure, the police intercepted telephonic communications. Such interception was and is illegal under section 605 of the Federal Communications Act of 1934. Evidence thus illegally obtained will be inadmissible in a trial in our State courts after June 17, 1968 (*Lee* v. *Florida*, 392 U. S. 378, and *Fuller* v. *Alaska*, 393 U. S. 80, followed). Said section 605 (U. S. Code, tit. 47, § 605) was amended, not repealed, by the Omnibus Crime Control and Safe Streets Act of 1968 (82 U. S. Stat. 197 to 239). Accordingly, defendant's motion to suppress such evidence is granted.

2. However, evidence which the police obtained, not by intercepting telephonic communications, but by means of other electronic "eavesdropping" or "bugging", will not be ordered suppressed, unless the court now finds that the affidavits and ex parte orders of authorization did not meet the standards which were reasonably believed to be applicable at the time when those orders were obtained (*People* v. *Morhouse*, 21 N Y 2d 66, 77, followed).

3. It cannot be said that defendant's right to a speedy trial has been violated. Although some 2½ years have elapsed thus far, the delay has been occasioned to a substantial degree by pretrial motions made by said defendant and by other defendants to suppress evidence; and therefore, defendant's motion to dismiss the indictment is denied.

David M. Markowitz for defendant. *Frank S. Hogan, District Attorney* (*Harry Hochhauser* of counsel), for plaintiff.

HAROLD BIRNS, J. The defendant Trief, a former New York City police officer, one of several defendants charged under the former Penal Law with the crimes of conspiracy and accepting unlawful fees, moves to suppress evidence admittedly obtained by interception of telephonic communications (wiretapping) and eavesdropping (bugging).[1] The defendant also moves to dismiss

1. Currently, under section 814 of the Code of Criminal Procedure, eavesdropping is defined as "wiretapping" or "mechanical overhearing of conversation" as those terms are defined in section 250.00 of the Penal Law. Said section 250.00 reads as follows as far as applicable: "1. 'Wiretapping' means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment. • • •

"2. 'Mechanical overhearing of a conversation' means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment." See, also, "Wiretapping electronic eavesdropping, and the police: a note on the present state of the law." I. Younger, 42 N. Y. Univ. L. Rev., 83 (1967).

the indictment for failure to prosecute.

The placing of the indictment of the defendant and others on the trial calendar obliged this court to consider the motion to suppress pursuant to the order of Mr. Justice POSTEL of May 28, 1969. The hearing on the said motion did not occur until June 2, 1970 and briefs have now been submitted by each side.

I

The defendant and others were indicted on June 28, 1968 following a lengthy investigation, which began in 1960 into organized unlawful gambling. The nature of this investigation required utilization of "electronic surveillance". Numerous court orders and renewals were obtained, the last order expiring in July, 1965.

Relying upon two recent decisions of the United States Supreme Court, *Lee* v. *Florida* (392 U. S. 378 [June 17, 1968]), and *Fuller* v. *Alaska* (393 U. S. 80 [Oct. 28, 1968]), the defendant Trief asserts that the evidence so procured by telephonic interceptions from 1960 to 1965 may no longer be received in evidence, inasmuch as such procurement violated section 605 of the Federal Communications Act of 1934 (U. S. Code, tit. 47, § 605).

The District Attorney, conceding that the *Lee* and *Fuller* decisions (*supra*) proscribed the use of such evidence as violative of the said section 605, asserts that by the adoption of the Omnibus Crime Control and Safe Streets Act of 1968 (82 U. S. Stat. 197 to 239; Public Law 90–351, June 19, 1968) (hereafter referred to as the Omnibus Act), Congress repealed said section 605. Hence, the District Attorney argues that because said section 605 "is no longer viable", there is no present bar to the receipt of such evidence, and inasmuch as the orders authorizing interception and divulgence were obtained during the years when such State-authorized orders were lawful under the decision of the United States Supreme Court in *Schwartz* v. *Texas* (344 U. S. 199 [1952]), the issues of this motion should be resolved under the law as it then existed.

The following brief resumé and chronology of some of the leading cases involving "wiretapping" and construing section 605 are necessary for an appreciation and resolution of the contentions of the parties thereto.

In 1928, the first of these cases, *Olmstead* v. *United States* (277 U. S. 438), was decided. The Supreme Court of the United States held that tapping telephone wires and using such inter-

cepted messages did not constitute an unreasonable search and seizure under the Fourth Amendment, inasmuch as no trespass into a constitutionally protected area and no seizure of anything tangible had occurred.

In 1928 no Federal statute governed wiretapping. Section 605 in its original form was enacted in 1934, and provided "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, report, effect, or meaning of such intercepted communication to any person". (U. S. Code, tit. 47, § 605.)

In 1937, the Supreme Court held in *Nardone* v. *United States* (302 U. S. 379), that evidence obtained by wiretapping in violation of section 605 was inadmissible in Federal courts. This ruling was not based on constitutional grounds, but rather on the court's supervisory powers over Federal lower courts and Federal officers.

In 1939, in a later appeal by Nardone (308 U. S. 338), the Supreme Court went further, holding that section 605 not only bars evidence obtained directly by wiretapping, but also barred evidence obtained by the use of leads secured by wiretapping. In that same year, in *Weiss* v. *United States* (308 U. S. 320), our highest court held that section 605 prohibited the divulgence of intrastate as well as interstate calls.

In 1942, in *Goldstein* v. *United States* (316 U. S. 114), the Supreme Court held that only a party to a tapped conversation had standing to object to evidence so obtained.

In 1952, in *Schwartz* v. *Texas* (344 U. S. 199, *supra*) the Supreme Court ruled that although it was a Federal crime for State officers to divulge wiretapping evidence, section 605 did not render such evidence inadmissible in a State court. The Supreme Court, observing that Congress had not, by enacting said section 605, intended to impose a rule of evidence on State courts barring the acceptance of wiretap evidence, suggested, however, that such wiretapping activity by State law enforcement officers violated that section and was punishable under applicable Federal penal statutes (*Schwartz* v. *Texas, supra*, pp. 201–203).

In 1957, the Supreme Court held in *Benanti* v. *United States* (355 U. S. 96) that wiretapping evidence obtained by State officers under sanction of State law, i.e., by court orders authorizing such interception and divulgence, could not be received in Federal trials.

Also, in 1957, in *Rathbun* v. *United States* (355 U. S. 107), the Supreme Court held that section 605 was not violated when police officers listened in on a telephone over an extension with permission of one party to the conversation, inasmuch as there was no forbidden "interception".

Benanti (*supra*) presaged *Lee* v. *Florida* (392 U. S. 378, *supra*) where on June 16, 1968 the Supreme Court specifically overruled *Schwartz* v. *Texas* (*supra*) and finally held inadmissible in State criminal trials evidence violative of section 605. And within four months, in October, 1968, in *Fuller* v. *Alaska* (393 U. S. 80, *supra*) the Supreme Court applied the exclusionary rule enunciated in *Lee* (*supra*) to trials in which such wiretap evidence is sought to be introduced after the date of the *Lee* decision.[2]

In *Lee* (*supra*) the court expanded its previous applications of section 605 so as to preclude the receipt of wiretap evidence at State as well as Federal trials and declared that the courts of the land, Federal and State, were bound to obey "the laws of the United States". Commenting upon continued reliance by State authorities on the ruling in *Schwartz* v. *Texas* (*supra*), explaining its reason for overruling that case, the court declared "that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way—by removing the incentive to disregard it.'" (*Lee, supra*, pp. 386–387.)[3]

And while it is noted that in 1969 in *Kaiser* v. *New York* (394 U. S. 280), the court affirmed a conviction predicated on wiretaps obtained under a State order in 1964 (which order, as here, was obtained prior to the adoption of the Omnibus Act of 1968) the court was careful to point out that the trial in the *Kaiser* case

2. For a more complete exposition of the problems involving interpretation of section 605 and the application of the Fourth Amendment standards to telephonic interceptions and trespassory eavesdropping, see Legislative History of Omnibus Crime Control and Safe Streets Act of 1968, as reported in vol. 2, 1968, U. S. Code Cong. and Adm. News, pp. 2154–2156, whose summary of the above cases has been utilized herein. (See, also, *Matter of Interception of Tel. Communications*, 9 Misc 2d 121 [HOFSTADTER, J.].)

3. Constitutional considerations of unlawful search and seizure, i.e., Fourth Amendment rights, were not applied by the United States Supreme Court to wiretap cases at the time *Schwartz* v. *Texas* (*supra*) was decided in 1952. Under *Wolf* v. *Colorado* (338 U. S. 25 [1949]) the Supreme Court had held that in a prosecution for a State crime, the Fourteenth Amendment did not forbid the admission of evidence obtained by an illegal search and seizure (*Lee* v. *Florida, supra*, p. 383). In *Elkins* v. *United States* (364 U. S. 206 [1960]) "the Court repudiated the 'silver platter doctrine' under which evidence obtained by state officers in violation of the Fourth and Fourteenth Amendments could be received as evidence in the federal courts" (*Lee* v. *Florida, supra*, p. 384, n. 7). With the decision in 1961 in *Mapp* v. *Ohio* (367 U. S. 643), the *Wolf* decision was overruled and it was "squarely held that evidence obtained by state officers in an unreasonable search is inadmissible in a state criminal trial" (*Lee* v. *Florida, supra*, p. 385).

occurred prior to its ruling that the *Lee* decision (*supra*) was only to be applied prospectively (*Fuller* v. *Alaska*, *supra*).

None of the latter cases (*Lee*, *Fuller*, or *Kaiser*, *supra*) has considered the claim now argued by the District Attorney that said section 605 was repealed by the enactment of the Omnibus Act of 1968. Accordingly, it is now necessary to consider whether section 605 was actually repealed by the adoption of that statute.[4]

The Omnibus Crime Control and Safe Streets Act of 1968 was intended "to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings." (Public Law, 90-351, § 801, subd. [b]; vol. 1, 1968, U. S. Code Cong. and Adm. News, p. 253.)[5]

Congress simultaneously reconsidered section 605 of the Federal Communications Act of 1934 by including, in the Omnibus Bill, section 803 relating to "unauthorized publication of communications". Said section 803 of the Omnibus Bill and said section 605 are identical.

Section 605 was not repealed, as the District Attorney urges. It was amended. It is still viable. The interception and divulgence of telephonic communications are still outlawed, "Except as authorized" by the Omnibus Crime Control Bill (U. S. Code, tit. 47, § 605, as amd. on June 19, 1968). This was the declared intent of Congress (Sen. Rep. No. 1097, as reported in vol. 2, 1968, U. S. Code Cong. and Adm. News, *supra*, p. 2196).

Thus, this court is obliged to hold that, as to the telephonic interceptions made by police officers in this case under court authorizations during the years 1960-1965, the prospective application of *Lee* v. *Florida* (*supra*) as enunciated in *Fuller* v. *Alaska*

4. This point was touched upon in the recent case of *People* v. *Basciano* (62 Misc 2d 546 [City Ct. of Yonkers]) in holding that *Lee* v. *Florida* (*supra*) and *Fuller* v. *Alaska* (*supra*) currently bar the introduction of State wiretaps, where authorizations were obtained prior to the adoption of the Omnibus Crime Control and Safe Streets Act of 1968.

5. In connection with applications and orders for the interception of wire and oral conversations, the Congress has established and utilized the standards set down in *Berger* v. *New York* (388 U. S. 41) and *Katz* v. *United States* (389 U. S. 347). (See U. S. Code, tit. 18, §§ 2516-2519; 82 U. S. Stat. 216.) Thus, the application of constitutional rights and standards under the Fourth Amendment to eavesdropping and bugging practices on Federal and local law enforcement officials, has now by this Omnibus Bill been expanded to apply to instances where orders for telephonic interception and divulgences are sought by such officials. (See Sen. Rep. No. 1097, as reported in U. S. Code Cong. and Adm. News, *supra*, p. 2156.)

(*supra*) proscribes their introduction at a trial, and hence to this extent the motion of defendant Trief must be granted.[6]

II

A different conclusion, however, is required of that branch of the motion addressed to the suppression of evidence obtained through eavesdropping [bugging]. The technique of "bugging" by police officials herein did not involve the interception of telephonic communications. Therefore, consideration of this second branch of the motion does not require a consideration of said section 605 of the Federal Communications Act of 1934.

This branch of the motion, however, does require consideration of the law applicable to "bugging" at the time the orders authorizing such police activity were obtained.

The said eavesdrops were authorized by orders issued by Justices of this court during the years 1960 to 1965, pursuant to section 813-a of the Code of Criminal Procedure.

In *Berger* v. *New York* (388 U. S. 41 [1967]), section 813-a was declared unconstitutional in relation to "bugging"; and in *People* v. *Morhouse* (21 N Y 2d 66) our highest court held that *Berger* was not to be given retroactive effect. In *Morhouse*, however, the Court of Appeals did state (p. 77): "The prosecution's conduct in obtaining and carrying out these eavesdrop orders, and the orders themselves, are to be tested only against the standards reasonably believed applicable at the time such orders were obtained and this conduct occurred."

Accordingly, the defendant, now having in his possession copies of all affidavits, orders and inventories by virtue of the order of Mr. Justice POSTEL, may submit to this court, upon due notice to the District Attorney, such affidavits and orders as the

6. No avenue for a contrary disposition of this branch of the motion is opened by the decision in *Desist* v. *United States* (394 U. S. 244). That case merely held that the departure announced in the *Katz* case (*supra*), i.e., "that the reach of the Fourth Amendment 'cannot turn upon the presence or absence of a physical intrusion into any given enclosure'" (*Desist*, *supra*, p. 246), was to be given prospective effect. *Katz* and *Desist* were cases involving "bugging". Indeed, in *Desist* the court commented upon the adoption of a rule of prospective application in cases involving telephonic interception, stating (p. 250): "Following this reasoning • • • we recently held in *Fuller* v. *Alaska* • • • that the exclusionary rule of *Lee* v. *Florida* • • • should be accorded only prospective application. Analogizing *Lee* to *Mapp*, we concluded that evidence seized in violation of § 605 of the Federal Communications Act was 'no less relevant and reliable than that seized in violation of the Fourth Amendment,' and that both decisions were merely 'designed to enforce the federal law.'" Significantly, *Kaiser* v. *New York* (*supra*) was announced on the same day as *Desist* (see p. 275 herein). Accordingly, *Desist* cannot be construed as affording a view that the United States Supreme Court did not mean what it said in *Lee*.

defendant believes fail to conform to the standards governing eavesdropping at the time such orders were issued, for appropriate examination in connection with the current motion to suppress (see *People* v. *Griffin*, N. Y. L. J., Sept. 1, 1970, p. 2, col. 4).

III

Inasmuch as the indictment herein was filed on June 28, 1968, and the passage of time until the present was occasioned to a substantial degree by the motion of the defendant Trief, as well as other defendants, to suppress evidence as related herein, the defendant's motion to dismiss because of failure to obtain a speedy trial is denied.[7]

This corrected decision by the court, *sua sponte*, is filed *nunc pro tunc* as of September 28, 1970, the date of the original decision.

MATTER OF ALLEN V. MURPHY [37 AD 2d 117]

In the Matter of LEONARD ALLEN, Petitioner, *v.* PATRICK V. MURPHY, as Police Commissioner of the City of New York, Respondent.

In the Matter of CHARLES W. LEIGH, Petitioner, *v.* PATRICK V. MURPHY, as Police Commissioner of the City of New York, Respondent.

First Department, June 29, 1971.

Civil service — police — wiretap evidence — wiretap evidence or fruits thereof used in proceeding resulting in dismissal of petitioners from Police Department for misconduct — use of such evidence improper in this proceeding but evidence available other than that obtained by wiretap — matter remanded for evaluation of such evidence.

1. Police Commissioner's determination dismissing petitioners from Police Department for misconduct should be annulled and the matter remanded. Wiretap evidence or the fruits thereof was used. Although at the time the evidence was obtained by wiretapping it was admissible in evidence in State trials, in light of the authorities, the divulgence and use of such evidence would be prohibited in this proceeding. However, in this case there was other evidence besides that obtained by the use of the wiretap. What consideration was given the prohibited evidence or to what extent it affected or influenced the determination is not evident. In light of the seriousness of the charges, respondent should be afforded the opportunity to separately consider and evaluate such evidence.

2. The contention that by reason of the long delay in bringing them to trial they were denied due process and it became impossible for them to obtain a fair trial is without merit.

PROCEEDINGS under CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the First Judicial Department by orders of the Supreme Court at Special Term, entered in New York County) to review determinations of respondent Police Commissioner of the City of New York dismissing petitioners from their positions as patrolmen in the New York City Police Department.

Victor J. Herwitz for petitioners.

Edmund B. Hennefeld of counsel (*Stanley Buchsbaum* with him on the brief; *J. Lee Rankin, Corporation Counsel*), for respondent.

Per Curiam. In these CPLR article 78 proceedings (transferred to the Appellate Division by orders of Special Term, LUPIANO, J.) petitioners seek a review and annulment of respondent's determination, dated October 7, 1970, dismissing them from the department for misconduct.[1] Since identical questions are involved in both proceedings they are discussed and treated together.

The charges were (1) that while assigned to the Chief Inspector's Investigating Unit and for a period from August 31, 1963 to on or about June 24, 1964, petitioners conspired with other members of the Police Department and others, to aid and abet certain known gamblers in carrying on their gambling operations; (2) as part of the same conspiracy petitioners in furtherance thereof, together with other members of the Police Department, willfully and corruptly agreed to refrain from the honest performance of their duty with respect to enforcement of the State gambling laws.

On the evidence before us, if such evidence were competent, the determination would be fully warranted and confirmed. However, petitioners urge that the evidence was obtained by wiretapping, and the use of such evidence is proscribed. It is urged also by petitioners that, *inter alia,* by reason of the long delay in bringing them to trial they were denied due process and it became impossible for them to obtain a fair trial. The latter contention of petitioners is, in our opinion, without merit. The alleged use of wiretap evidence, however, presents a more serious issue. It does appear that wiretap evidence or the fruits thereof was used here. At the time the evidence, or part thereof, was obtained by wiretapping it was clearly admissible in evidence in State trials (*Schwartz* v. *Texas,* 344 U. S. 199). But in *Lee* v. *Florida* (392 U. S. 378) where, without permission of the parties, Florida police connected a telephone in a neighboring house to a party line and recorded conversations heard on the party line, which recordings were thereafter introduced in evidence, over objection, at petitioner's trial for violation of the State lottery laws, the conviction was reversed. The case was decided June 17, 1968, and expressly overruled *Schwartz v. Texas* (*supra*). The court found the police conduct to be a violation of section 605 of the Federal Communications Act (U. S. Code, tit. 47, § 605) in view of the express Federal prohibition against divulgence of recordings procured illegally, and held that evidence violative of section 605 is not admissible in State criminal trials. In *Fuller* v. *Alaska* (393 U. S. 80) the Supreme Court held "that the exclusionary rule of *Lee* is to be given prospective application" only.

It had been held earlier in *Mapp* v. *Ohio* (367 U. S. 643) that evidence obtained by State officers in an unreasonable search was inadmissible in State criminal trials. And in *Matter of Finn's Liq. Shop* v. *State Liq. Auth.* (24 N Y 2d 647) the exclusionary rule of *Mapp* v. *Ohio* was applied to administrative proceedings. In light of the foregoing authorities the divulgence and use of evidence obtained by means of a wiretap would be prohibited in this proceeding (see, also, *People* v. *Iannacone,* 36 A D 2d 747; *People* v. *Trief,* 37 A D 2d 553).[1] In the case before us there was other evidence besides that obtained by the use of the wiretap. It is not immediately evident what consideration was given the prohibited evidence nor to what extent it affected or influenced the determination. It may well be that the evidence not subject to the restriction heretofore indicated might, when separately considered, warrant a similar determination to that before us. At any rate, in light of the seriousness of the charges respondent should be afforded the opportunity to separately consider and evaluate such evidence.

The determinations reviewed should be annulled and the matter remanded to respondent for further proceedings not inconsistent with our decision, without costs to either party.

STEVENS, P. J., CAPOZZOLI, MCGIVERN, MARKEWICH and TILZER, JJ., concur.

Determinations of respondent dated October 7, 1970, unanimously annulled and the matter remanded to respondent for further proceedings not inconsistent with the *Per Curiam* opinion of this court filed herein, without costs and without disbursements.

APPENDIX 4

MEMORANDA, First Dept., June, 1971 [37 AD 2d 553]

(June 29, 1971)

1 THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. GEORGE TRIEF, Respondent, et al., Defendants. Order, Supreme Court, New York County, entered on November 25, 1970, unanimously affirmed on the opinion of Mr. Justice BIRNS at Trial Term. No opinion. Concur — Stevens, P. J., Capozzoli, McGivern, Markewich and Tilzer, JJ. [65 Misc 2d 272.]

APPENDIX 5

MEMORANDA, First Dept., Sept. 1971 [37 AD 2d 770]
(September 30, 1971)

3 In the Matter of LEONARD ALLEN v. PATRICK V. MURPHY. In the Matter of CHARLES W. LEIGH v. PATRICK V. MURPHY. - Respondent moves for reargument or leave to appeal to the Court of Appeals from orders of this court entered June 29, 1971, which annulled determinations dismissing the petitioners from the police department and remanding the matters for further proceedings. The motions are granted insofar as they seek reargument. Upon reargument the prior decision and orders of this court (37 A D 2d 117), each entered on June 29, 1971, are vacated, and further, the determinations of the respondent, each dated October 7, 1970, which terminated the services of the petitioners herein, are unanimously confirmed, without costs and without disbursements. It is conceded by the appellants that the cases of *People* v. *Feinlowitz* (29 N Y 2d 176) and *People* v. *Iannaccone* (29 N Y 2d 612) require that reargument be granted. Since the record indicates the evidence used at the administrative hearings would be admissible under the afore-mentioned cases, the determinations appealed from are confirmed. Concur — Stevens, P. J., Capozzoli, McGivern, Markewich and Tilzer, JJ.

4 THE PEOPLE OF THE STATE OF NEW YORK v. EDWARD KERRIGAN, MARTIN GAUDIA and ALBERT LEVY. — Motion by the People for reargument granted; and, upon reargument, the judgment of the Supreme Court, New York County,

APPENDIX 6

MEMORANDA, First Dept., Sept.1971 [37 AD 2d 771]
(September 30, 1971)

5 THE PEOPLE OF THE STATE OF NEW YORK v. GEORGE TRIEF et al. — Motion for reargument granted, and upon reargument, the order of this court entered on June 29, 1971 [37 A D 2d 553], be and the same hereby is vacated, and the order of the Supreme Court, New York County, entered on November 25, 1970, is unanimously reversed, on the law, the motion denied, and the matter remitted to BIRNS, J. for further proceedings consistent herewith. Without passing on the validity of the specific wiretap orders, defendant's motion to suppress was granted in the court below on the authority of *Fuller* v. *Alaska* (393 U. S. 80) and *Lee* v. *Florida* (392 U. S. 378). We affirmed on June 29, 1971. On July 7, 1971, subsequent to this court's affirmance, the Court of Appeals, in *People* v. *Feinlowitz* (29 N Y 2d 176) and *People* v. *Iannaccone* (29 N Y 2d 612) held that wiretap evidence obtained before *Lee* v. *Florida* (*supra*) was decided, is admissible in trials held after the date of that decision. The court held, in *Feinlowitz* (*supra*, pp. 181-182) as follows: "Hence, if the evidence was seized in a manner constitutionally permissible at the time of seizure, it will subsequently be allowed into evidence at the defendant's trial even though changing constitutional interpretations have since made a similar seizure impermissible." Since it has not yet done so, the court below should pass upon the validity of the specific wiretap orders in question, taking into account the affidavits upon which they were based and the procedure followed in obtaining them. Concur - Stevens, P. J., Capozzoli, McGivern, Markewich and Tilzer, JJ.

APPENDIX 7

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* STANLEY KOUTNIK, EDWARD CONLON, FRANCIS DOLAN, JOHN J. SMITH, WALTER TELEKY, LOUIS MARANGELLO, GEORGE TRIEF, JAMES CONWAY, CHARLES SAWLING, JAMES T. STEVENS, PAUL MEDICA, LOUIS COSTELLO, EDWARD NIGRO, SEYMOUR FREEDMAN, LAWRENCE JESSUP, CHARLES LEIGH and LEONARD ALLEN, Appellants, et al., Defendants.

First Department, March 14, 1974.

Crimes — eavesdropping warrants — some 107 wiretap orders between 1960 and 1964, based on conclusory affidavits which failed to reveal sources and reliability of information, were invalid; without those illegally overheard conversations, prosecutor's cases were insufficient; judgments of conviction, some rendered after trial and some on pleas of guilty, are reversed and cases are remanded for further proceedings — defendants did not obtain complete transactional immunity from prosecution.

1. A wiretap warrant in 1960 was based mainly on an Assistant District Attorney's affidavit which conclusorily alleged "Observations by police officers and investigators" and "confidential information"; and hence the order was invalid for lack of probable cause. Subsequently, between 1961 and 1964, some 106 wiretaps and eavesdropping orders were issued by the same Justice, most of them based mainly upon an affidavit by the same Assistant District Attorney. Practically all of those subsequent affidavits were merely conclusory and failed to reveal the sources of the information or the reliability of the informers, and each of those subsequent orders was predicated on information obtained from the previously invalidly authorized interceptions. Thus, all of the 107 orders lacked probable cause and were invalid. All the conversations thus overheard should have been suppressed from evidence, on defendants' motions therefor. Without those conversations, the prosecutor's cases against the defendants were utterly insufficient. Therefore the judgments of conviction — some of them rendered on pleas of guilty and some of them rendered after a nonjury trial — are reversed by the Appellate Division and the cases are remanded to the court for further proceedings consistent with the opinion of the Appellate Division.

2. Under unconstitutional threats of job forfeiture, seven of the defendants (police officers) were compelled to sign limited waivers of immunity. The then existing procedures for conferring immunity (former Penal Law, § 2447; Code Crim. Pro., § 619-c) were not followed. None of the evidence, and none of the fruits of the evidence, obtained by their appearances before that grand jury, were presented to the subsequent grand jury which indicted them. Therefore, those defendants did not obtain complete transactional immunity from prosecution.

APPEALS by defendants Charles Leigh and Leonard Allen from judgments of the Supreme Court, New York County (HAROLD BIRNS, J.), rendered November 29, 1972, convicting them, after a nonjury trial, of conspiracy to take unlawful fees (former Penal Law, §§ 580, 1826).

APPEALS by defendant Stanley Koutnik and by the 14 other defendants-appellants from judgments of the Supreme Court,

New York County (HAROLD BIENS, J.), rendered in February, March and April, 1972, and in January, 1973, convicting them, upon their pleas of guilty, of conspiracy to take unlawful fees (former Penal Law §§ 580, 1826).

All the appeals are taken from all intermediate orders also.

Victor J. Herwitz for Charles Leigh and another, appellants.

Richard Dienst of counsel (*Schofield, Dienst & Allen*, attorneys), for Stanley Koutnik and others, appellants.

Jonathan Lovett of counsel (*Michael R. Juviler* with him on the brief; *Frank S. Hogan, District Attorney*), for respondent.

MURPHY, J. Between October, 1960 and June, 1964, the New York County District Attorney's office actively and extensively investigated alleged police involvement in certain illicit gambling operations in New York City. During the course of that investigation 107 wiretaps and eavesdropping orders were obtained for 39 different locations. As a result of such electronic surveillance, plus observations made by the prosecutor's investigators, appellants were indicted in 1968. The gravamen of the multi-count indictment is that, between June, 1962 and June, 1964, they conspired to solicit and receive unlawful fees for permitting illegal gambling operations to be conducted.

On September 28, 1970 appellants' motion to suppress all evidence adduced as a result of wiretaps was granted on the ground that they violated section 605 of the Federal Communications Act (U. S. Code, tit. 47, § 605) and were therefore inadmissible in this State court proceeding. (*Lee* v. *Florida*, 392 U. S. 378; *Fuller* v. *Alaska*, 393 U. S. 80.) We unanimously affirmed the suppression order. (*People* v. *Trief*, 37 A D 2d 553.) Some nine days later the Court of Appeals decided *People* v. *Feinlowitz* (29 N Y 2d 176) which, in effect, held that Congressional enactment of the Omnibus Crime Control and Safe Streets Act of 1968 (U. S. Code, tit. 18, § 2511 *et seq.*), substantially amending section 605, sanctioned the use of wiretaps authorized prior to its effective date, provided there was substantial compliance with the newly enacted provisions. The majority of the court in *Feinlowitz* then held that substantial compliance was shown in that case since the single wiretap was judicially supervised, section 813-a of the Code of Criminal Procedure had been fully complied with and probable cause for the challenged seizure clearly indicated. We thereupon granted the People's motion for reargument and, upon reargument, vacated our prior order of affirmance, reversed the order of suppression and

remanded the case to "pass upon the validity of the specific wiretap orders in question, taking into account the affidavits upon which they were based and the procedure followed in obtaining them". (*People* v. *Trief*, 37 A D 2d 771.)

A hearing pursuant to our direction was then held. The Trial Judge examined each of the 107 orders and underlying supporting affidavits and concluded that since the applicant and issuing Judge in almost every case were the same, the Justice granting the orders was sufficiently familiar with the over-all history and progress of the investigation to satisfy the recently enunciated Congressional policy of allowing "courtroom use of judicially supervised and controlled wiretaps". (*People* v. *Feinlowitz, supra*, p. 185.)

Following the denial of the motion to suppress the evidence derived from the execution of the 107 orders, all appellants except Leigh and Allen pleaded guilty to the first count of the indictment, charging conspiracy to commit the crime of taking unlawful fees, in satisfaction of all charges, and were fined, sentenced to the New York City Penitentiary for terms not exceeding nine months, or given suspended sentences. Execution of all prison terms has been stayed pending this appeal. Appellants Leigh and Allen were convicted of the same charge after a nonjury trial and received suspended six-month terms of imprisonment and $250 fines or six months' imprisonment. The fines were paid.

Pursuant to agreement, Leigh and Allen were tried on a stipulated trial record consisting, *inter alia*, of the transcript of their police departmental trial and exhibits introduced thereat (which resulted in their dismissal from the police service for misconduct). Among the evidence included in said stipulation (subject to a continuing objection to their admissibility) were certain tape recorded conversations; excerpts from appellants' memorandum books; a certain collection of papers seized from an alleged gambler and coconspirator, Rocco Errichetti, referred to as the "Rock Papers"; and the testimony of a "stipulated expert" on gambling offenses who decoded the gambler's jargon used by the parties and cross-referenced the Rock Papers, the defendants' telephone conversations and their memo book entries for the trial court.

The principal evidence in the case against Leigh and Allen centered around the Rock Papers which were seized pursuant to a search warrant. These documents consisted, essentially, of instructions as to how to receive, record and relay information pertaining to "protected" gambling locations and

warnings of impending police action; and entries made pursuant to said instructions. Lieutenant Comperiati, the Police Department's "expert" in policy and gambling cases, though unable to identify the author of the Rock Papers and conceding that Leigh and Allen's names did not appear therein, by comparing taped telephone conversations between Leigh or Allen with Errichetti with material contained in their own memo books and entries in the Rock Papers, attempted to establish their involvement in the conspiracy.

The Rock Papers also contain notations indicating payments made by, or due from, the operators of gambling locations. But nothing contained therein indicates that appellants solicited or received any moneys for permitting gamblers or others to conduct their illegal operations in violation of law. Nor does any or all of the other evidence in the case sustain the charge of conspiracy to commit the crime of taking unlawful fees as there is no evidence at all in the record of an agreement to take money, a request for money, a conversation or discussion concerning the passing of money or the actual passing of money. This element of the crime has not been proven. However, even if we assume, *arguendo*, that the services rendered by these dismissed former policemen were not gratuitous, that their disclosed involvement in obtaining lists of protected locations from Errichetti and their disclosure to him of impending police action were sufficient to exclude every hypothesis other than their guilt of conspiring to receive unlawful fees for their corrupt work (*People* v. *Williams*, 41 A D 2d 711), and that the Rock Papers were properly connected with, and admitted against, Leigh and Allen (*People* v. *Wheatman*, 31 N Y 2d 12) —the crucial issue in all of these cases is the admissibility of the recorded conversations or, more succinctly, the sufficiency of the affidavits on which the eavesdropping orders were obtained. Without the evidence sought to be suppressed, it may be assumed that the prosecutor's cases against each appellant would be effectively destroyed. Indeed, the People so stated, as they were required to do, when prosecuting their appeal from the original order granting the suppression motion. (Code Crim. Pro., § 518-a.)

A complicating factor is that not all defendants have standing to attack all of the orders. For appellate purposes, the parties have entered into a stipulation identifying the particular defendants who may challenge specified orders and their supporting affidavit. In summary, all or some of the appellants have standing to challenge 42 orders and lack standing to chal-

lenge the remaining 65. As noted above, the trial court sustained the eavesdropping orders because the accumulation of facts justified a finding of probable cause for their issuance, despite the fact that the individual affidavits did not contain a sufficient degree of particularity and specificity to meet current requirements. We disagree.

The essential burden of the prosecutor's argument is that the affidavits which appellants lack standing to challenge were sufficient to apprise the single Justice who issued most of the eavesdropping orders of the progress of the investigation and contained enough factual background to support the affidavits underlying the orders which they may challenge.

Appellants Leigh and Allen concededly have standing to challenge the first wiretap order for intercepting telephonic communications of any of the named appellants or alleged conspirators. The main supporting affidavit (sworn to Nov. 17, 1960) states:

"This office is conducting an investigation to determine whether the crimes of conspiracy and violations of sections 1372 and 974(a) of the Penal Law, are being committed in New York County.

"Observations by police officers and investigators assigned to this investigation disclose that policy operations are being conducted in the Harlem area of New York County.

"This office has received confidential information to the effect that certain policy operators currently under observation by investigators have been paying police officers for 'protection' from interference and arrest.

"The same source of information advises that a police officer assigned to the Chief Inspector's office, whose name sounds like 'Lee' or 'Lehy', had picked up 'protection' money from policy operators. Later the informant was able to observe the license plate number of a car driven by this individual. Investigation discloses that the car is registered to Madeleine Leigh of * * *. Police Department records show that the said Madeleine Leigh is the wife of Charles A. Leigh, a police officer assigned to the Chief Inspector's office.

"Investigation further discloses that the telephone instrument bearing the special non-published number * * * is listed to Charles W. Leigh at * * *.

"In view of the foregoing, there is reasonable ground to believe that if the telephonic communications transmitted over the aforesaid telephone line and instrument are intercepted, evidence of crime may be obtained."

This affidavit was patently deficient and failed to meet even the stricken standards of section 813-a of the Code of Criminal Procedure. (*Berger* v. *New York*, 388 U. S. 41; *People* v. *McCall*, 17 N Y 2d 152.) Similarly, virtually all of the other supporting affidavits, including those which all defendants have standing to challenge, are largely conclusory in content and fail to reveal the sources of confidential information received or the reliability thereof. (*People* v. *McCall*, *supra*; *People* v. *Hendricks*, 25 N Y 2d 129; *Aguilar* v. *Texas*, 378 U. S. 108; *Spinelli* v. *United States*, 393 U. S. 410.) In our view the underlying affidavits upon which the seizure orders were granted fall far short of the test for admissibility enunciated in *Feinlowitz*. Moreover, though not all appellants may challenge all of the wiretap orders, and some may challenge none of them, each subsequent order is predicated on information obtained from previously authorized interceptions, and are so intertwined and interrelated as to cast a shadow upon the entire investigation. Thus, if we start with the first affidavit above quoted, supporting the wiretap order on Leigh's phone, and accept its legal insufficiency, we cannot reasonably conclude that its connection with the subsequent wiretap orders and the discovery of the challenged evidence had "become so attenuated as to dissipate the taint" (*Nardone* v. *United States*, 308 U. S. 338, 341); or that any lawfully obtained orders were not procured by exploitation of the first improperly granted order. (Cf. *Wong Sun* v. *United States*, 371 U. S. 471; *People* v. *Robinson*, 13 N Y 2d 296.) Accordingly, the suppression motions should have been granted.

Seven appellants were subpoenaed to testify before grand juries (other than the one that indicted them) and compelled to sign limited waivers of immunity under threat of job forfeiture. Relying on *Garrity* v. *New Jersey* (385 U. S. 493), they contend that their waivers of immunity were invalid and that, as a consequence of so testifying, they received transactional immunity. Their first contention is correct; the second is not. Since these appellants have stipulated that (a) no evidence (or fruits of any such evidence) obtained from said Grand Jury appearances was presented to the 1968 Grand Jury which indicted them and (b) the procedures set forth in section 2447 of the former Penal Law and its successor, section 619-c of the Code of Criminal Procedure, were not followed, they did not obtain complete immunity. (*People* v. *Laino*, 10 N Y 2d 161.)

Finally, appellants argue that they were denied a speedy trial. However, in light of our previous consideration of this question

on a related proceeding (*Matter of Leigh* v. *Murphy*, 37 A D 2d 117), the parties have stipulated to remove this issue upon this appeal and "preserve the point, should this matter be appealed to the Court of Appeals".

The order of Supreme Court, New York County (Birns, J.) entered on or about November 30, 1971, denying motions to suppress all wiretap and eavesdropping orders should be reversed, on the law, and said motions granted, the individual judgments of conviction thereafter rendered against the respective appellants reversed, on the law, and vacated, and the cases remanded to Supreme Court, New York County, for further proceedings consistent herewith.

Settle orders on notice.

Kupferman, J. P., Tilzer, Capozzoli and Lane, JJ., concur.

Order of Supreme Court, New York County, entered on or about November 30, 1971, denying motions to suppress all wiretap and eavesdropping orders, unanimously reversed, on the law, and said motions granted, the individual judgments of conviction of said court thereafter rendered against the respective appellants (Stanley Koutnik—March 2, 1972; Edward Conlon—February 14, 1972; Francis Dolan—March 1, 1972; John J. Smith—January 8, 1973; Walter Teleky—March 16, 1972; Louis Marangello—March 6, 1972; George Trief—March 15, 1972; James Conway—April 4, 1972; Charles Sawling—April 4, 1972; James T. Stevens—February 9, 1972; Paul Medica—April 17, 1972; Louis Costello—March 6, 1972; Edward Nigro—March 20, 1972; Seymour Freedman—March 27, 1972; Lawrence Jessup—March 27, 1972; Charles Leigh—November 29, 1972; Leonard Allen—November 29, 1972) unanimously reversed, on the law, and vacated, and the cases remanded to the Supreme Court, New York County, for further proceedings consistent with the opinion of this court filed herein.

Settle orders on notice.

APPENDIX 8

[45 AD 2d 693]
MEMORANDA, First Dept., June, 1974

12 In the Matter of LEONARD ALLEN v. PATRICK V. MURPHY. In the Matter of CHARLES W. LEIGH v. PATRICK V. MURPHY.—Motion to vacate the orders of this court entered September 30, 1971 granted and the prior orders of the court entered June 29, 1971 are reinstated to the extent of annulling respondent's determinations dismissing the petitioners and remanding for further proceedings consistent herewith. The underlying article 78 proceeding brought to review respondent's determinations dismissing petitioners from the police force was first considered by this court in conjunction with a related criminal proceeding. Initially, we affirmed an order in the criminal proceeding which granted suppression with respect to certain evidence obtained in violation of section 605 of the Federal Communications Act (U. S. Code, tit. 47, § 605). (*People* v. *Trief*, 37 A D 2d 553.) Accordingly, in the article 78 proceeding we similarly held that the evidence should not have been considered at the police departmental trial (*Matter of Finn's Liq. Shop* v. *State Liq. Auth.*, 24 N Y 2d 647) and the Police Commissioner's determinations were annulled and the matters remanded for further proceedings (*Matter of Allen* v. *Murphy*, 37 A D 2d 117; orders entered June 29, 1971). Subsequently, the Court of Appeals in *People* v. *Feinlowitz* (29 N Y 2d 176) held in effect, that the Omnibus Crime Control and Safe Streets Act of 1968 (U. S. Code, tit. 18, § 2511 *et seq.*) sanctioned the use of evidence obtained pursuant to wiretaps authorized prior to its effective date so long as there was substantial compliance with the provisions of that act. A motion for reargument was thereupon granted in *People* v. *Trief* (37 A D 2d 771, *supra*), and upon reargument, the order granting suppression was reversed, the motion was denied and the matter was remitted for consideration of "the validity of the specific wiretap orders in question, taking into account the affidavits upon which they were based and the procedure followed in obtaining them." (*People* v. *Trief*, *supra*.) Based in part upon such reversal and the denial of the motion to suppress and further, upon the initial conclusion that the evidence would be admissible under the standards enunciated in *People* v. *Feinlowitz* (*supra*), the orders entered June 29, 1971 in the article 78 proceeding were vacated and by orders entered September 30, 1971 the Police Commissioner's determinations were confirmed. Pursuant to this court's remand in *People* v. *Trief* (*supra*) a suppression hearing was held and it was determined that the wiretap orders were properly issued and accordingly, suppression was denied. Following denial of the motion to suppress, various of the defendants pleaded guilty to conspiracy to commit the crime of taking unlawful fees. Petitioners Leigh and Allen proceeded to trial and were found guilty of the same charge. Finally, the defendants, in the criminal proceeding, appealed the judgments of conviction and upon appeal this court held that the wiretap orders were improperly issued since the affidavits submitted in support of those applications "failed to meet even the stricken standards of section 813-a of the Code of Criminal Procedure", and the motion

to suppress was therefore granted. (*People* v. *Koutnik*, 44 A D 2d 48.) It is not disputed that the wiretap orders which this court found invalid in *People* v. *Koutnik* (*supra*), included the very same orders involved in the police departmental hearings and that the evidence offered at those hearings, emanated, at least in part, from execution of those orders. Throughout these entire proceedings this court has considered the criminal and article 78 proceedings together in an attempt to achieve a uniform and just result. It is apparent that the orders of this court entered September 30, 1971 which confirmed the respondent's determinations were based in substantial part upon the decision in *People* v. *Trief* (*supra*), wherein the order granting suppression was reversed and the motion denied. Subsequently, when this court decided in *People* v. *Koutnik* (*supra*) that the wiretap orders were improperly issued and that the motions to suppress should have been granted, the very foundation for the orders entered September 30, 1971 was removed. (Cf. *Feldberg* v. *Howard Fulton St.*, 44 Misc 2d 218, affd. 24 A D 2d 704, affd. 16 N Y 2d 1041.) Accordingly, pursuant to CPLR 5015 (subd. [a], par. 5) which provides that a "court which rendered a judgment or order may relieve a party from it • • • upon the ground of • • • reversal, modification or vacatur of a prior judgment or order upon which it is based", and upon the inherent power of the court to vacate its own orders in the interest of justice (see *McCarthy* v. *Port of N. Y. Auth.*, 21 A D 2d 125; 5 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 5015.12), the motion is granted, the orders entered September 30, 1971 are vacated and the orders entered June 29, 1971 are reinstated to the extent of annulling the respondent's determinations and the matter remanded for further proceedings consistent herewith. Concur — McGivern, P. J., Markewich, Tilzer and Capozzoli, JJ.

In the Matter of CHARLES W. LEIGH, Appellant, *v.* PATRICK V. MURPHY, as Police Commissioner of the City of New York, Respondent.

Submitted May 6, 1974; decided July 10, 1974.

Appeal — Court of Appeals — academic and moot questions — appeal from order of Appellate Division which, upon reargument, vacated prior order of said court and confirmed determination of respondent dismissing petitioner from Police Department — subsequently, Appellate Division granted motion to vacate order appealed from and reinstated its original order to extent of annulling said determination and remanding for further proceedings — on court's own motion, appeal dismissed as moot.

Reported below, 37 A D 2d 770.

APPEAL from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered September 30, 1971 in a proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court at Special Term, entered in New York County), which, upon reargument, vacated a prior decision and order of said court entered June 29, 1971 (see 37 A D 2d 117), and unanimously confirmed a determination of the Police Commissioner of the City of New York, dismissing petitioner from his position as patrolman in the New York City Police Department. By order dated June 18, 1974 (see 45 A D 2d 693), the Appellate Division granted a motion by petitioner to vacate its order entered September 30, 1971 and reinstated its order entered June 29, 1971 to the extent of annulling respondent's determination and remanding the matter for further proceedings consistent with its opinion.

Victor J. Herwitz for appellant.

Adrian P. Burke, Corporation Counsel, for respondent.

On the court's own motion, appeal dismissed, without costs, for mootness.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v STANLEY KOUTNIK, EDWARD CONLON, FRANCIS DOLAN, JOHN J. SMITH, WALTER TELEKY, LOUIS MARANGELLO, GEORGE TRIEF, JAMES CONWAY, CHARLES SAWLING, JAMES T. STEVENS, PAUL MEDICA, LOUIS COSTELLO, EDWARD NIGRO, SEYMOUR FREEDMAN and LAWRENCE JESSUP, Respondents, et al., Defendants.

Argued September 9, 1975; decided October 23, 1975

Crimes — eavesdropping orders — Appellate Division reversed orders denying motions by defendants to suppress evidence derived from execution of 107 wiretap and eavesdropping orders obtained during course of investigation of police involvement in illegal gambling operations, granted defendants' motions to suppress, and reversed and vacated judgments convicting defendants of conspiracy to commit crime of taking unlawful fees, upon pleas of guilty, entered following denial of motions to suppress — orders of Appellate Division affirmed — in order to sustain wiretap and eavesdropping orders underlying convictions, number of unacceptable premises would be required — Memorandum by court.

People v Koutnik, 44 AD2d 48, affirmed.

APPEALS, by permission of the Chief Judge of the Court of Appeals, from orders of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 3, 1974, which (1) (a) reversed, on the law, orders of the Supreme Court (HAROLD BIRNS, J.), entered in New York County, denying motions by defendants to suppress evidence derived from the execution of wiretap and eavesdropping orders, and (b) granted the motions to suppress, and (2) (a) reversed, on the law, and vacated judgments of the Supreme Court (HAROLD BIRNS, J.), rendered in New York County, convicting defendants of conspiracy to commit the crime of taking unlawful fees, upon pleas of guilty, entered by them following the denial of their motions to suppress, and (b) remanded the cases to the Supreme Court, New York County, for further proceedings consistent with the opinion at the Appellate Division.

Robert M. Morgenthau, District Attorney (Steven Kartagener, Jonathan Lovett and *Lewis R. Friedman* of counsel), for appellant.

Victor J. Herwitz for Charles Sawling, respondent.

Richard A. Dienst for Stanley Koutnik and others, respondents.

MEMORANDUM. Orders of the Appellate Division affirmed.

Underlying the convictions vacated by the Appellate Division are 107 wiretap and eavesdropping orders obtained during the course of an investigation by the New York County District Attorney's office of police involvement in illegal gambling operations. In order to sustain these wiretap and eavesdropping orders, a number of unacceptable premises would be required.

The first presumption is that, subsequent to the events and the intervening changes in the Federal and State law governing wiretapping and eavesdropping orders, the connecting links could be pieced together, through a mass of papers many inches in thickness, which would establish probable cause resting exclusively on evidence obtained without being subject to suppression under the changing and changed exclusionary rules.

The second embraces a presumption that the Supreme Court Justice who signed most of the orders recalled the bases upon which prior orders had been issued. In addition to such remarkable recollection, he had to understand that the bases for the prior orders were also the basis for the order immediately before him. This presumption would be applied despite any indication to him or by him of the historical relevance of the bases upon which the prior orders had been granted, and despite absence of any incorporation by reference in the application before him.

The third presumption is that reviewing courts and the persons with standing to attack the order or orders before him would have also understood the unexpressed basis upon which the order or orders had been granted. Another facet of this presumption would be that in such circumstances, upon an attack on the sufficiency of the order or orders, counsel adverse to the order or orders would have an adequate, fair, and practical opportunity to analyze the bases for the order or orders attacked.

None of these presumptions reflect reality and in any event would place an intolerable burden on the very persons for whose protection the restrictions on wiretapping and eavesdropping orders have been imposed. In so holding it is recognized, of course, that defendants unquestionably guilty and self-confessed by their pleas of guilty escape criminal conviction, and in some cases, punishment, to which on the merits they would be properly subject. Nevertheless, such distortion of results on the merits is precisely the cost of maintaining

procedural justice under a system of law. Palliative of this result, although not entirely satisfactory, is that because of the tortuous paths these criminal litigations have followed they involve crimes of over a decade ago. Nor is the particular result of wide precedential significance, since the issues concern a gap between the older law of more than a decade ago and the decisional and Federal and State statute law as it exists today. On the other hand, were the court to undo the determinations of the Appellate Division in order to "save the prosecutions", a violation of principle would be infused, a violation which itself, as a procedural device or jurisprudential technique, might have destructive precedential influence.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur.

Orders affirmed in a memorandum.

APPENDIX 11

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 576--September Term, 1979.

(Argued December 17, 1979

Decided January 8, 1980.)

Docket No. 79-7561

LEO A. QUINN,

Appellant,

--v.--

SYRACUSE MODEL NEIGHBORHOOD CORPORATION; PETER WHITE, Individually and in his capacity as Executive Director of Syracuse Model Neighborhood Corporation; LEE ALEXANDER, Individually and in his capacity as Mayor of the City of Syracuse; DAVID S. MICHEL, Individually and in his capacity as Commissioner of the Department of Community Development for the City of Syracuse; JOHN MUNGOVAN, Individually and in his capacity as Deputy Commissioner of the Department of Community Development for the City of Syracuse and THE CITY OF SYRACUSE,

Appellees.

* * * *

B.

Finally, we must determine the appropriate statute of limitations to govern suits against New York municipalities under § 1983, a question Judge Munson did not address below.[6] The three-year limitations period embodied in New York Civil Practice Law § 214(2) has traditionally governed § 1983 suits against individuals, *see* note 6 *supra*, but we have not, until now, had occasion to pass on the period applicable to claims against municipalities.[7] Our point

6 Judge Munson did not reach this question because he could discern no municipal policy on which to base § 1983 liability, regardless of the applicable statute of limitations.

Appellees' argument that the one year and 90 day period set forth in *N.Y. Gen. Mun. Law* § 50(i)(1) governs claims for damages against individuals under § 1983 must fall before the unbroken line of cases applying the three-year limitations period of *N.Y. Civ. Prac. Law* § 214(2) to such claims. *See, e.g., Leigh v. McGuire*, No. 79-7479 (2d Cir. Dec. 19, 1979); *Meyer v. Frank*, 550 F.2d 726 (2d Cir.), *cert. denied*, 434 U.S. 830 (1977); *Swan v. Board of Higher Education*, 319 F.2d 56 (2d Cir. 1963). Indeed, we note that recent developments suggest the applicability of *N.Y. Civ. Prac. Law* § 213(1), the six-year residual statute of limitations, to suits arising under 42 U.S.C. § 1983. *Compare State v. Cortelle Corp.*, 38 N.Y.2d 83, 378 N.Y.S.2d 654, 655 (1975) (Breitel, C.J.) (§ 214(2) does not apply to "[s]tatutory provisions which provide only additional remedies or standing [but] do not create or impose new obligations") *with Chapman v. Houston Welfare Rights Org.*, 60 L.Ed.2d 508, 523 (1979) ("by its terms, as well as its history, [§ 1983] does not provide any rights at all.")

7 In *Fine v. City of New York*, 529 F.2d 70, 76 (2d Cir. 1975), we suggested, in *dictum*, that *N.Y. Gen. Mun. Law* § 50(i)(1)

of reference, of course, is the law of New York, since where "there is no specifically or otherwise relevant federal statute of limitation ... the controlling period would ordinarily be the most appropriate one provided by state law." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

Quinn contends that, by analogy to § 1983 suits against individuals, the most appropriate period is the three-year limitation imposed by § 214(2) for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute." The City of Syracuse, by contrast, urges adoption of the one year and 90 day provision of New York General Municipal Law § 50(i)(1), which applies to suits "for personal injury or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city ... or of any officer, agent or employee thereof." If the City is correct, Quinn's claim against it is time-barred.

We hold, however, that the § 214(2) limitations period governs suits under § 1983, regardless of the legal status of the defendant under New York law. In *Monell, supra*, the Supreme Court held that a municipality is a "person" for purposes of § 1983. Since 1963, this court has consistently stated that § 214(2) applies in § 1983 suits against "persons," *see Swan v. Board of Higher Education*, 319 F.2d 56 (2d Cir. 1963), even though § 50(i) (1) includes, within its terms, city officers, agents and employees. To create

"would appear to be the most appropriate" period of limitations for suits against municipalities based squarely on the Fourteenth Amendment. This question is not before us, and our cautious suggestion in *Fine* is no wise answers the question as to the appropriate limitations period for § 1983 suits against municipalities.

different limitations periods for two similarly situated classes of defendants would create a distinction without a difference, and would engender unnecessary confusion for litigants and judges alike. Thus, we hold that the most appropriate limitations period for suits against municipalities under § 1983 is that which has been heretofore applied in actions against individual municipal officers and employees.

The judgment is reversed and the case remanded to the district court for further proceedings consistent with this opinion.

APPENDIX 12

In the Matter of FINN'S LIQUOR SHOP, INC., Respondent, *v.* STATE LIQUOR AUTHORITY, Appellant.

In the Matter of NICHOLAS LA PENTA, JR., Doing Business as TUNIC'S HOTEL, Respondent *v.* STATE LIQUOR AUTHORITY, Appellant.

In the Matter of ANNA MALIK, Respondent, *v.* NEW YORK STATE LIQUOR AUTHORITY, Appellant.

Argued February 26, 1969; decided April 24, 1969.

Intoxicating liquors — licenses — evidence — exclusionary rule of Mapp v. Ohio (367 U. S. 643) applies to administrative proceedings before State Liquor Authority as well as to criminal prosecutions — broad grant of statutory authority to State Liquor Authority to conduct searches without warrant would be unconstitutional — State Liquor Authority's determination suspending liquor license, based on evidence which was product of unlawful search and seizure, properly annulled — where, with regard to another petitioner, County Court had voided eavesdropping order and subsequently issued search warrant, petitioner not required to litigate validity of order and warrant again before State Liquor Authority — in third proceeding, also, State Liquor Authority may not disregard court determination that evidence was fruit of illegal search and seizure.

1. The exclusionary rule of *Mapp* v. *Ohio* (367 U. S. 643) applies to administrative proceedings before the State Liquor Authority as well as to criminal prosecutions.

2. Two inspectors from the State Liquor Authority entered a liquor shop and asked the store manager, the only person present, if they could inspect the premises. When the manager told them to "go ahead," one of the inspectors

went immediately to a room in the rear of the liquor store where a coat was hanging and went through the pockets of the coat and found sales slips indicating that sales had been made on credit. It is not clear that the Authority has a broad statutory power to make an administrative inspection of the licensed premises, including all items of personal property such as the coat in the rear room. In any event, such a broad grant of statutory authority to conduct warrantless searches would be unconstitutional. The investigator's entry into the back room of the store and, particularly, his search of the coat may not be constitutionally justified.

3. No basis exists for disturbing the conclusion reached by the Appellate Division that the questioning of the liquor store's principal, like all of the other items in evidence, was the product of the unlawful search and seizure, and that the Authority's determination, grounded on such evidence, must fall.

4. In the case of another licensee, evidence from his home was seized during a search made pursuant to a search warrant obtained after interception of telephone conversations pursuant to an ex parte eavesdropping order. A court thereafter voided the eavesdropping order and the search warrant. Since the search was unlawful per se in the absence of a valid warrant, the evidence obtained as a result of the search was inadmissible for any purpose and the Authority's determination based upon such evidence was, therefore, properly annulled.

5. Similarly, in the case of another licensee, from whose premises evidence was seized during a search which was made incidental to an arrest, the Authority may not disregard a court determinaton, made upon a motion to suppress the use of said evidence in criminal proceedings against the licensee, that the arrest to which the search was incidental was made without probable cause and the evidence must be suppressed. The court's decision is determinative of the issue and, although it is reviewable through the normal appellate process, neither the administrative hearing nor the article 78 proceeding to review it constitutes an appropriate proceeding to pass upon its propriety.

Matter of Finn's Liq. Shop v. *State Liq. Auth.*, 31 A D 2d 15, affirmed.
Matter of La Penta v. *State Liq. Auth.*, 30 A D 2d 1033, affirmed.
Matter of Malik v. *New York State Liq. Auth.*, 30 A D 2d 1040, affirmed.

APPEAL, in the first above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 7, 1968, which, in a proceeding under CPLR article 78 (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in New York County), annulled a determination of the State Liquor Authority suspending petitioner's liquor license, directing a forfeiture of the bond filed by petitioner and issuing a letter of warning to petitioner.

APPEAL, in the second above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered October 24, 1968, which,

Points of Counsel

in a proceeding under CPLR article 78 (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Onondaga County), annulled a determination of the State Liquor Authority canceling petitioner's hotel liquor license.

APPEAL, in the third above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered October 31, 1968, which, in a proceeding under CPLR 78 (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Erie County), annulled a determination of the State Liquor Authority suspending petitioner's restaurant liquor license and directing a forfeiture of the bond filed by petitioner.

Louis J. Lefkowitz, Attorney-General (*Samuel A. Hirshowitz* and *Brenda Soloff* of counsel), for appellant in the first above-entitled proceeding. I. The Authority properly relied upon the sales slips in making the administrative determination. The Appellate Division was mistaken in holding that the statutory right to inspect was limited to optical observations. (*Lipshitz* v. *T. & D. Wine & Liqs.*, 190 Misc. 261; *Matter of Fortino* v. *State Liq. Auth.*, 273 N. Y. 31; *Matter of Toshimi Okamura* v. *Hostetter*, 20 A D 2d 757, 14 N Y 2d 485; *Silber* v. *Bloodgood*, 177 Wis. 608; *O'Hare* v. *Peacock Dairies*, 26 Cal. App. 2d 345; *Martin* v. *Reynolds Metals Corp.*, 297 F. 2d 49; *Matter of McKaba* v. *Board of Regents of Univ. of State of N. Y.*, 30 A D 2d 495; *United States* v. *Duffy*, 282 F. Supp. 777.) II. The inspection provided for by the statute was beyond the reach of the Fourth Amendment provision for a search warrant. (*Mapp* v. *Ohio*, 367 U. S. 643; *People* v. *Richter's Jewelers*, 291 N. Y. 161; *Bloodgood* v. *Lynch*, 293 N. Y. 308; *Matter of Thanhauser* v. *Milprint, Inc.*, 9 A D 2d 833; *Matter of Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15; *Peeples* v. *United States*, 341 F. 2d 60; *United States* v. *Duffy*, 282 F. Supp. 777; *United States* v. *Sessions*, 283 F. Supp. 746; *United States* v. *Two Soaking Units*, 48 F. 2d 107; *Plunkett* v. *Calhoun*, 46 F. 2d 796; *Camden County Beverage Co.* v. *Blair*, 46 F. 2d 648; *Johnson* v. *New Jersey*, 384 U. S. 719; *Camara* v. *Municipal Ct.*, 387 U. S. 523; *See* v. *City of Seattle*, 387 U. S. 541; *United States* v. *Stanack Sales Co.*, 387 F. 2d 849.) III. Proof of compliance with the Fourth Amendment is not constitutionally required in order that evi-

Points of Counsel

dence may be used in an administrative proceeding. (*Johnson* v. *New Jersey*, 384 U. S. 719; *Sackler* v. *Sackler*, 15 N Y 2d 40; *Camden County Beverage Co.* v. *Blair*, 46 F. 2d 648; *Fleury* v. *Edwards*, 14 N Y 2d 334; *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693; *Boyd* v. *United States*, 116 U. S. 616.) IV. The "poisonous tree" doctrine is not applicable here. (*Wong Sun* v. *United States*, 371 U. S. 471; *Swinney* v. *United States*, 391 F. 2d 190; *Matter of Leogrande* v. *State Liq. Auth. of State of N. Y.*, 19 N Y 2d 418.)

Samuel B. Waterman for respondent in the first above-entitled proceeding. I. The determination of the State Liquor Authority on the first charge was properly annulled on the ground that the sales slips and statement explaining them were obtained in violation of petitioner's constitutional rights and should have been excluded as evidence. II. The search of the coat was made in violation of the Fourth Amendment of the United States Constitution. (*See* v. *City of Seattle*, 387 U. S. 541.) III. The only statutory provision for inspection concerning petitioner's premises, provided in the Alcoholic Beverage Control Law (§ 105, subd. 15) does not authorize inspection of the premises. (*Matter of Gross* v. *New York City Alcoholic Beverage Control Bd.*, 7 N Y 2d 531.) IV. There was no legal consent to the search of the coat in the rear of petitioner's premises. (*Johnson* v. *United States*, 333 U. S. 10; *Amos* v. *United States*, 255 U. S. 313.) V. The statement, exhibit 2, obtained from petitioner's officer Finn, must be excluded from evidence, having been obtained directly from a search in violation of the Fourth Amendment. (*Silverthorne Lbr. Co.* v. *United States*, 251 U. S. 392.) VI. Evidence obtained by an unconstitutional search is inadmissible in an administrative proceeding to penalize a licensee. (*Incorporated Vil. of Laurel Hollow* v. *Laverne, Inc.*, 24 A D 2d 615, 17 N Y 2d 421; *Matter of Leogrande* v. *State Liq. Auth. of State of N. Y.*, 25 A D 2d 225.) VII. The determination of appellant on the second charge was properly annulled. VIII. Appellant could not use papers illegally seized for any purpose, including questioning at an interview.

Louis J. Lefkowitz, Attorney-General (*Brenda Soloff* and *Samuel A. Hirshowitz* of counsel), for appellant in the second

above-entitled proceeding. I. The fact that evidence was ordered suppressed by the County Court in a criminal proceeding against petitioner does not require the State Liquor Authority to suppress such evidence in proceedings against petitioner's liquor license. (*Matter of New York State Labor Relations Bd.* v. *Holland Laundry*, 294 N. Y. 480; *B. R. DeWitt, Inc.* v. *Hall*, 19 N Y 2d 141; *People* v. *Lo Cicero*, 14 N Y 2d 374; *Commissioners of State Ins. Fund* v. *Low*, 3 N Y 2d 590; *Matter of Brawer* v. *Criminal Ct. of City of N. Y.*, 47 Misc 2d 411; *Matter of Katz's Delicatessen* v. *O'Connell*, 302 N. Y. 286; *Matter of Lynch's Bldrs. Rest.* v. *O'Connell*, 303 N. Y. 408; *Matter of Leogrande* v. *State Liq. Auth. of State of N. Y.*, 25 A D 2d 225, 19 N Y 2d 418.) II. The record available to the State Liquor Authority indicates that petitioner did not establish that he was aggrieved by an illegal search and seizure. (*People* v. *McDonnell*, 18 N Y 2d 509; *People* v. *Morhouse*, 21 N Y 2d 66; *Matter of Sarisohn*, 21 N Y 2d 36; *Goldstein* v. *United States*, 316 U. S. 114; *United States* v. *Tane*, 329 F. 2d 848; *United States ex rel. Ross v. LaVallee*, 341 F. 2d 823, 382 U. S. 867.) III. The exclusionary rule of *Mapp* v. *Ohio* (367 U. S. 643) is not applicable to administrative proceedings (*Johnson* v. *New Jersey*, 384 U. S. 719; *Sackler* v. *Sackler*, 15 N Y 2d 40; *Camden County Beverage Co.* v. *Blair*, 46 F. 2d 648; *People* v. *Richter's Jewelers*, 291 N. Y. 161; *Matter of Hecht* v. *Monaghan*, 307 N. Y. 461; *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693; *Camara* v. *Municipal Ct.*, 387 U. S. 523; *See* v. *City of Seattle*, 387 U. S. 541; *Matter of Evans* v. *Monaghan*, 306 N. Y. 312; *Matter of Tortora* v. *New York State Liq. Auth.*, 29 A D 2d 739; *Matter of Story* v. *Hults*, 19 N Y 2d 936.)

A. Albert Fein for respondent in the second above-entitled proceeding. I. There was no competent evidence on which to sustain the charge. (*Matter of Leogrande* v. *State Liq. Auth. of State of N. Y.*, 25 A D 2d 225, 19 N Y 2d 418.) II. The penalty is excessive and an abuse of the Authority's discretion. (*Matter of Stolz* v. *Board of Regents of State of N. Y.*, 4 A D 2d 361; *Matter of McGinnis' Broadway Rest.* v. *Rohan*, 6 A D 2d 115.)

Louis J. Lefkowitz, Attorney-General (*Brenda Soloff* and *Samuel A. Hirshowitz* of counsel), for appellant in the third

above-entitled proceeding. I. The fact that evidence was ordered suppressed by the City Court of Buffalo, New York, in criminal proceedings against petitioner does not require the State Liquor Authority to suppress such evidence in proceedings against petitioner's liquor license. (*Matter of New York State Labor Relations Bd.* v. *Holland Laundry*, 294 N. Y. 480; *B. R. DeWitt, Inc.* v. *Hall*, 19 N Y 2d 141; *People* v. *Lo Cicero*, 14 N Y 2d 374; *Matter of Brawer* v. *Criminal Ct. of City of N. Y.*, 47 Misc 2d 411; *Weekes* v. *O'Connell*, 304 N. Y. 259.) II. The record before the State Liquor Authority reveals ample probable cause for the arrest in the instant case. (*People* v. *Valentine*, 17 N Y 2d 128; *People* v. *Malinsky*, 15 N Y 2d 86.) III. The entry into petitioner's business premises and the seizure of gambling paraphernalia were within the scope of statutory authority to enforce the state liquor laws. (*Matter of Yates* v. *Mulrooney*, 245 App. Div. 146; *State* v. *Zurawski*, 89 N. J. Super. 488, 47 N. J. 160.) IV. The exclusionary rule of *Mapp* v. *Ohio* (367 U. S. 643) is not applicable to administrative proceedings. (*Johnson* v. *New Jersey*, 384 U. S. 719; *Sackler* v. *Sackler*, 15 N Y 2d 40; *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693; *Boyd* v. *United States*, 116 U. S. 616; *Camara* v. *Municipal Ct.*, 387 U. S. 523; *See* v. *City of Seattle*, 387 U. S. 541.) V. There was substantial competent evidence to sustain the suspension of petitioner's license. (*Matter of Sowa* v. *Looney*, 23 N Y 2d 329; *Matter of Avon Bar & Grill* v. *O'Connell*, 301 N. Y. 150; *Consolidated Edison Co.* v. *Labor Bd.*, 305 U. S. 197; *Matter of Kopec* v. *Buffalo Brake Beam-Acme Steel & Malleable Iron Works*, 304 N. Y. 65.)

Crucian S. Messina for respondent in the third above-entitled proceeding. I. The State Liquor Authority is bound by the order made by the City Court Judge, which established that the arrest of petitioner was illegal and the search subsequent to the arrest was illegal. II. The evidence having been suppressed was not competent and admissible evidence in the hearing before the State Liquor Authority to suspend the license and forfeit bond. (*Mapp* v. *Ohio*, 367 U. S. 643; *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693; *Boyd* v. *United States*, 116 U. S. 616; *People* v. *Laverne*, 14 N Y 2d 304; *Incorporated Vil. of Laurel Hollow* v. *Laverne*, 24 A D 2d 615, 16 N Y 2d 612; *Sackler* v. *Sackler*, 15 N Y 2d 40.) III. The State Liquor Authority can-

not make a *de novo* determination that probable cause for the arrest of defendant, Anna Malik, existed. IV. The State Liquor Authority investigators are bound by the search and seizure law as established by the case of *Mapp* v. *Ohio*. V. The record does not contain a scintilla of evidence to sustain the determination of the State Liquor Authority. VI. The suspension and penalty imposed was excessive under all the circumstances.

Chief Judge FULD. In each of these cases, the Appellate Division annulled a determination of the State Liquor Authority on the ground that it was based upon evidence obtained by an illegal search and seizure, and the primary question presented is whether the exclusionary rule of *Mapp* v. *Ohio* (367 U. S. 643) applies to administrative proceedings as well as to criminal prosecutions. We discuss that question before examining the several issues posed by the individual appeals.

The function of the exclusionary rule, as stated by the Supreme Court (*Mapp* v. *Ohio*, 367 U. S., at p. 656), "'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" (See, also, *Kaufman* v. *United States*, 394 U. S. 226, 229; *Lee* v. *Florida*, 392 U. S. 378, 387; *Elkins* v. *United States*, 364 U. S. 206, 217.) To the extent that the State, or its agents, can bypass the deterrent effect of the exclusionary rule by using the fruits of an illegal search in a "civil" or "administrative" proceeding, the incentive for enforcement and investigative personnel to exceed constitutional limitations on their activity remains and the effectiveness of the rule as a deterrent is diminished. Recognizing this, the courts have never hesitated to apply the exclusionary rule to a variety of proceedings, including those which, at least in form, are not of a criminal character. (See *Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693; *Incorporated Vil. of Laurel Hollow* v. *Laverne Originals*, 17 N Y 2d 900; *Matter of Leogrande* v. *State Liq. Auth.*, 25 A D 2d 225, revd. on other grounds 19 N Y 2d 418.) In the *Plymouth Sedan* case (380 U. S. 693, *supra*)—a civil forfeiture suit brought to confiscate an automobile allegedly used for the illegal transportation of alcoholic beverages—the Supreme Court, after noting that the object of the action, "like a criminal proceeding, is to penalize for the commission of an offense against the law" (380 U. S., at p. 700), went on to say (p. 701):

> "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible."

The Authority seeks to distinguish the *Plymouth Sedan* case on the ground that its sole function is administrative—the regulation of the liquor industry—and the enforcement of the criminal law is, at most, a peripheral concern.[1] To the extent that this is true, it makes the argument all the more compelling that, if the exclusionary rule is to be effective, it may not be limited to purely criminal proceedings. It is no longer subject to question that State agencies, charged with purely administrative responsibilities, just as those engaged in the enforcement of the criminal law, must conduct their investigative and enforcement functions in compliance with constitutional requirements and, more particularly, within the confines of the Fourth Amendment. (See *Camara* v. *Municipal Ct.*, 387 U. S. 523, 530–531; *See* v. *City of Seattle*, 387 U. S. 541.)

Claiming that adequate protection of Fourth Amendment rights is assured if illegally obtained evidence is not admissible in criminal prosecutions, the Authority urges that the exclusionary rule should not be extended to administrative proceedings. In the absence of any other means of enforcement, however, the effect of such a restricted application of the rule would be to place the agency beyond the reach of the Constitution and there would be no way to protect licensees from abuse and harassment at the hands of its employees or agents.

1. We note, however, that, although the Alcoholic Beverage Control Law is essentially a remedial and regulatory statute, the violation of any of its provisions is punishable as a misdemeanor (Alcoholic Beverage Control Law, § 130). Moreover, in addition to its power to revoke, suspend or cancel licenses, which might be considered to be purely administrative remedies (§ 118), the Authority may also recover a bond claim, in an amount which is specifically delineated by statute as a "penal sum" (§ 112). Indeed, this purely "penal" sanction was actually imposed in two of the three cases presently before us. (See *Matter of Finn's Liq. Shop* v. *State Liq. Auth., infra*; *Matter of Malik* v. *State Liq. Auth., infra.*)

Opinion per Chief Judge FULD

In *Matter of Leogrande* v. *State Liq. Auth.* (25 A D 2d 225, revd. on other grounds 19 N Y 2d 418, *supra*), the Appellate Division had annulled the Authority's determination that the licensee had used his premises for gambling activities on the ground that the evidence upon which the determination was based was illegally obtained. "All of the reasons in policy which suggest the application of the exclusionary rule to illegal searches and seizures by public officers in criminal proceedings", Judge BREITEL, writing for that court declared (25 A D 2d at pp. 231-232), "apply equally to administrative proceedings of the present character, namely those involving penalties, forfeitures, or other sanctions for the violation of law or regulation • • • The exclusionary rule rests on a theory of deterrence; that policy would not be served if the illegal official activity could be used, despite unavailability in criminal proceedings, to effect parallel sanctions of forfeiture in an administrative proceeding." The Court of Appeals reversed -- but on the very different ground that the petitioner had failed to raise the question before the Authority and had thereby not preserved it for review.

The Authority contends that the Appellate Division's decision in *Leogrande* was inconsistent with our holding in *Sackler* v. *Sackler* (15 N Y 2d 40). Although we did, in *Sackler*, permit the use of unlawfully obtained evidence in a civil suit, we based our conclusion solely on the ground that the unlawful entry was committed by *private individuals* as opposed to *representatives of Government* and that, in the absence of State action, there was no constitutional violation involved. The court's opinion in *Sackler* expressly noted that the decision would not be controlling in a case where the evidence was illegally obtained "by governmental people" (15 N Y 2d, at p. 44; see, also, *People* v. *Horman*, 22 N Y 2d 378, 381-382).

The Authority, just as any other State agency, is obligated to conduct its activities in conformity with the demands of the Constitution. When its agents exceed those limits, it should not be permitted to avail itself of the fruits of such unlawful activity in order to impose sanctions upon the persons whose constitutional rights have been violated.

With this principle in mind, we proceed to a discussion of each of the three cases before us.

Opinion per Chief Judge FULD

Matter of Finn's Liquor Shop v. *State Liquor Authority*

Acting on a tip that sales were being made on credit, two inspectors from the State Liquor Authority entered Finn's Liquor Shop, in New York City, on a January day in 1967, and asked the store manager, the only person present, if they could inspect the premises. When the manager told them to "[g]o ahead," one of the inspectors went immediately to a room in the rear of the liquor store where a coat was hanging. Without bothering to ascertain its ownership, the inspector went through the pockets of the coat and found sales slips indicating that sales had been made, impermissibly, on credit.

The licensee's principal--Martin Finn--arrived at the premises shortly thereafter and, when confronted with the slips which the investigator had seized, he admitted that they were used for sales on credit. Finn was called to the offices of the Authority a week later for further questioning but, upon the advice of counsel, refused to answer any questions on the ground that to do so would incriminate him. Charges were filed against the petitioner, alleging that he had sold liquor on credit and had refused to answer questions in an investigation conducted by the Authority (Alcoholic Beverage Control Law, § 100, subd. 5: Rules of the State Liquor Authority, rule 36, subd. 15; 9 NYCRR 53.1 [o]). At the commencement of the hearing on those charges, the petitioner requested that all of the evidence resulting from the search of the coat be suppressed as unlawfully obtained. The hearing officer, relying on the *Leogrande* case (25 A D 2d 225, *supra*) which had not yet been decided by our court -agreed that illegally seized evidence would be inadmissible. However, voicing the opinion that he lacked jurisdiction to pass upon the constitutional question, he declined to suppress the evidence and suggested that the petitioner address his application to the Supreme Court. Relying upon the sales slips, Mr. Finn's admission as to their purpose and his subsequent refusal to answer questions, the Authority ordered a 10-day suspension of the license, a $1,000 bond forfeiture and the issuance of a letter of warning.

The petitioner thereupon instituted this article 78 proceeding in which it renewed its claim that the evidence was the product of an unlawful search and seizure and, for that reason, could

not be used against it.[2] The Appellate Division, First Department, unanimously sustained the petition and ordered that the Authority's determination be annulled. On appeal to our court, the Authority argues (1) that, as already indicated, the exclusionary rule does not apply to administrative proceedings; (2) that the evidence was obtained during the course of an authorized administrative inspection and involved no Fourth Amendment violation; and (3) that, in any event, the refusal by Finn to answer questions a week after the sales slips were found was not a fruit of the search and seizure and was sufficient, in itself, to support its determination.

We have already declared that, when a search is undertaken in violation of the Fourth Amendment, the exclusionary rule applies and the evidence may not form a predicate for the imposition of penalties. It is, therefore, necessary to ascertain whether, in fact, any such constitutional violation occurred in this case. The Authority maintains that it had a *statutory* right to make an administrative inspection of the licensed premises, that this included all items of personal property, such as the coat in the rear room, and that the exercise of this right was consistent with Fourth Amendment protections.

It should be pointed out, at the outset, that it is not at all clear that the Authority has the broad statutory power, which it claims, to conduct investigations of the premises of licensees for off-premises consumption.[3] Moreover, it is highly doubtful that an inspection of the "premises" would include an article of personal property (here, the coat) not used in the conduct of the business and whose ownership was not known. What is even more significant is that such a broad grant of statutory

2. Although the hearing officer ruled that he lacked the jurisdiction to pass upon the constitutional question — a conclusion with which we agree (see, *infra*, p. 660, n. 5; p. 662) — the circumstances of the search were fully explored in the record and the question was adequately preserved for review in the article 78 proceeding.

3. Although subdivision 7 of section 17 of the Alcoholic Beverage Control Law appears to give the Authority the right to inspect "any premises where alcoholic beverages are manufactured or sold", subdivision 15 of section 105, which specifically governs a licensee to sell for consumption off the premises, requires only that "*books and records*" be made available for inspection. In contrast, subdivision 15 of section 106, governing licensees who sell for "on-premises consumption", expressly grants the right to inspect the "*licensed premises*".

authority to conduct warrantless searches would be unconstitutional. (See *See* v. *City of Seattle*, 387 U. S. 541, *supra*; see, also, *Camara* v. *Municipal Ct.*, 387 U. S. 523, *supra*.) In *See* (387 U. S. 541, *supra*), the Supreme Court invalidated a local ordinance which, similar to the provisions relied upon by the Authority, required owners of business establishments to permit administrative inspections of their premises without a warrant. The court held that, with respect to those portions of business property not open to the public, the Fourth Amendment protections apply. In reaching that conclusion, the court declared (p. 543):

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant."

Although the court did indicate that the Constitution might not inhibit certain narrowly defined inspection procedures (cf. *Colonnade Catering Corp.* v. *United States*, 410 F. 2d 197), the implication of the decision in the *See* case is clear. No State may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Applying this principle to the present case, it follows that the investigator's entry into the back room of the store and, particularly, his search of the coat may not be constitutionally justified.[4]

The Authority also contends that, since the petitioner's refusal to answer questions was not the product of the search, this was a sufficient basis, in and of itself, for its determination. Although it is difficult to see how a provision which imposes penalties for refusing to answer questions may be consonant with the requirements of the Fifth Amendment, we need not

4. In point of fact, although the Authority's hearing officer declined to suppress the evidence, he recognized that the search in this case far exceeded the scope of the normal administrative inspection, stating that he was "flabbergasted that this Investigator should go into property and search a coat, whether it is on a hanger or on a person's back * * *, without permission or without color of right or without a search warrant".

here confront that problem. The Appellate Division found, and there is no evidence to the contrary, that "the knowledge used by the [Authority] was gained as the result of an illegal search, and excluding the fruit of the search would have rendered pointless and unnecessary the subsequent interrogation." No basis exists for disturbing the conclusion reached below that the questioning of Finn, like all of the other items in evidence, was the product of the unlawful search and seizure, and that the Authority's determination, grounded on such evidence, must fall.

Matter of La Penta v. *State Liquor Authority*

This petitioner holds a hotel liquor license. After intercepting his telephone conversations for a month -- pursuant to an ex parte eavesdropping order -- the police obtained a warrant to search his home, where they found various apparatus used for gambling. He was thereafter charged with a crime and, on his application in the course of that criminal prosecution, the County Court found that the order authorizing the wiretaps had been improperly issued and directed that the resulting evidence be suppressed. The Authority then instituted a proceeding for the cancellation of his license. Upon the hearing which it then conducted, the Authority received that very same wiretap evidence over objection. It concluded that the petitioner was of unfit character and ordered the cancellation of his license. The Appellate Division -- in this instance, the Fourth Department -- annulled the determination.

Although the applicability of the *Mapp* rule to administrative determinations was argued in this case, as in the others, there exists, wholly apart from the requirements of the Federal Constitution, an explicit statutory prohibition against the use of evidence procured through illegal wiretaps. CPLR 4506 provides, in so many words, that evidence obtained by any act of eavesdropping in violation of the applicable statutes and evidence obtained through or resulting from information obtained by any such act "shall be inadmissible for any purpose *in any civil or criminal action, proceeding or hearing*" (emphasis supplied). Despite this express prohibition, the Authority argues, the petitioner failed to properly raise the question and it was, therefore, privileged to accept and consider such evidence.

The fact is that the petitioner did object to its admission but the Authority insists that the objection was insufficient and contends that, in addition to his objecting and furnishing a copy of the County Court's order suppressing the evidence, he should have presented proof to support his position that the eavesdropping order was invalid and the search and seizure unlawful. More specifically, the Authority -- noting that it is in no way associated or connected with the District Attorney's Office -- argues that, in the absence of privity, it cannot be bound by an order issued in a criminal proceeding to which it was not a party. In short, says the Authority, since it was free to disregard the court's order, the petitioner was obliged to produce, at the administrative hearing, independent proof that the wiretaps were, in fact, illegal and that he had standing to object to their use.

This argument stems from a misapprehension of the agency's function. Although it has broad powers in its own sphere, it has never been given the authority to determine whether sufficient grounds exist for the issuance of a search warrant or an ex parte eavesdropping order. Manifestly, such a decision must be made, in the first instance, by a court and, presumably, only a court may review it.[5] Certainly, when a magistrate, issuing such an order, has been reversed by a superior court, the Authority may not continue to treat the lower court's order as valid and act upon it. The impropriety of permitting the agency to pass upon the validity of the search is illustrated by the facts of this case. Absent a valid warrant, the search of the petitioner's home and the seizure of the property were unlawful. Once the Authority was presented with the County Court's order, which voided the eavesdropping order and the subsequently issued search warrant, there was no possible basis

5. In this regard, it is interesting to compare the Authority's position in the present case with the view expressed by the hearing officer in the *Finn's Liquor Shop* case. In *Finn's Liquor Shop* -- which was located in Manhattan -- the hearing officer declined to pass upon the licensee's request to suppress the evidence, observing that, as a mere administrative official, he lacked the power to make a determination of the constitutional question. He suggested that the licensee apply to the Supreme Court for an order to suppress, with which he would then comply. In the present case -- involving a hotel in Syracuse -- the court granted the requisite suppression order but the Authority refused to accord it any weight.

upon which the search could be sustained as lawful. Since, in the absence of judicial sanction, the search was unlawful per se, there is not the slightest justification to require the petitioner to litigate the question anew before the administrative agency.

Simply put, the evidence against this petitioner, having been obtained through the use of an ex parte eavesdropping order which was invalidated by competent judicial authority, was inadmissible for any purpose. The Authority's determination based upon such evidence was, therefore, properly annulled.

Matter of Malik v. *State Liquor Authority*

In the fall of 1966, two police officers, while in the petitioner's bar in the City of Buffalo, observed two customers reading from a racing form and making notations on slips of paper. They saw each of the men take a sheet of paper, fold a dollar bill inside it and hand it to the petitioner who was tending bar. One of the officers arrested her and seized the papers, which appeared to be betting slips. The officer then proceeded to search the kitchen, in the rear of the premises, where he found various records and material used in bookmaking.

The City Court of Buffalo — in which criminal charges were brought against the petitioner — found, on a motion to suppress evidence, that there was no probable cause to arrest her and ordered that the betting slips and the evidence found in the kitchen be suppressed. At a subsequent hearing before the Liquor Authority, that court order was brought to the attention of the hearing examiner but the items " suppressed " were, nevertheless, received in evidence. The Authority, on the strength of such proof, decided that the petitioner violated the Alcoholic Beverage Control Law (§ 106, subd. 6) — in that she suffered or permitted gambling on the premises — suspended her license for 10 days and imposed a bond claim in the penal sum of $1,000. The petitioner brought this article 78 proceeding to review the determination, and a divided Appellate Division annulled the Authority's order on the ground that it was based upon evidence which had already been found to be illegally obtained.

Although all of the arguments raised on this appeal have already been considered in connection with the other cases, there is one factual difference in the present case which merits

further discussion. In *La Penta*, the search and seizure could only have been sustained if the search warrant was valid. Thus, the earlier court decision, invalidating the warrant and the ex parte eavesdropping order upon which it was based, rendered the unlawfulness of the search self-evident. In the present case, however, some of the evidence was obtained pursuant to a search which was incidental to an arrest and, hence, did not require prior judicial sanction. Nevertheless, the Authority was not permitted to disregard a court determination (in the criminal case) that the evidence was, in fact, the fruit of an illegal search and seizure. The Authority has given no adequate reason why it should be allowed to re-examine the issue of the legality of a search after a court has already decided the question. It merely asserts that it has no association with the District Attorney's Office and thus should not be concluded by a decision in a case in which it was not a party. Although the two agencies may be treated, for other purposes, as independent parties, this can hardly be the case where they are both seeking to use the same police officials as their agents to gather evidence. If the search and seizure was unconstitutional to the extent that it was performed for the benefit of the prosecutor, the same act could hardly be considered lawful for the Authority's purposes. Since the facts and the issues are the same, the court's decision on the motion to suppress that the search and seizure was illegal should be determinative of the issue. Such a decision is, of course, reviewable through the normal appellate process but neither the administrative hearing nor an action under article 78 to review it constitutes an appropriate proceeding to pass upon the propriety of a judicial decision which has never been directly challenged.

In sum, in each of these three cases, the evidence relied upon to support the Authority's determination was found to have been obtained in violation of the petitioner's Fourth Amendment rights. The logic of the *Mapp* rule, which requires the exclusion of such evidence in order to deter State officials from engaging in unlawful searches and seizures, applies equally whether the evidence is sought to be used in a criminal trial or on an administrative hearing. There can be no justification for any State agency, charged with enforcement of the law, to rely, in fulfilling

Dissenting opinion per JASEN, J.

its function, upon the unlawful and unconstitutional acts of its agents.

In each case, the order appealed from should be affirmed, with costs.

JASEN, J. (dissenting in first above-entitled proceeding). The Alcoholic Beverage Control Law requires the licensee to keep "adequate books and records of all transactions". (§ 105, subd. 15.) "Such books and records shall be available for inspection by any authorized representative of the liquor authority" (§ 105, subd. 15) and the State Liquor Authority has the general power "[t]o inspect or provide for the inspection of any premises where alcoholic beverages are manufactured or sold." (§ 17, subd. 7.)

Here, the Authority's investigators entered the licensed premises during business hours and received permission to inspect the premises and the books and records. It was during this authorized inspection that one of the investigators found, in a coat hanging in the back part of the licensed premises, the sales slips indicating that sales on credit were made by the licensee in violation of section 100 of the Alcoholic Beverage Control Law.

The majority have held that these sales slips were unlawfully seized and could not be used as evidence in any proceeding instituted by the Liquor Authority against the licensee.

I disagree with this view.

There can be no doubt that the liquor industry is of a peculiar genre, having an inordinately strong effect on our State's public health, welfare and morals, and it must of necessity be strictly controlled.

We recognized the right of the State to restrict, regulate and control every facet of this industry in *Seagram & Sons* v. *Hostetter* (16 N Y 2d 47), where we said: "A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who chose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture." (*Id.*, at p. 56.)

Indeed, as the dissenting opinion in that case noted: "No

Dissenting opinion per JASEN, J.

one will question the traditional rights of the States • • • under their inherent police power to prohibit, restrain or regulate the manufacture, sale and use of intoxicants [citations omitted]. The New York Legislature has power to enact a variety of laws calculated to suppress intemperance or to minimize the known evils of the liquor traffic, since the trade is one as to which there is a recognized public interest. But 'police power' is not a magic incantation to frighten off judicial investigation into the constitutionality of statutes. The State of New York could completely outlaw the sale of liquor but, having chosen instead to regulate it, the restrictions and requirements can be such only as are necessary to protect public safety, health and morals from the evils, known or apprehended, of the trade." (*Id.*, at p. 61.)

Rather than choosing to prohibit the sale of liquor by individuals as some States have done, New York has elected to license persons to engage in the liquor business. However, in order to protect the public from the many evils which that trade may generate, the State has declared certain transactions, such as the retail sale of liquor on credit, to be illegal. To enforce these regulations, the Liquor Authority was granted the right to make unannounced inspections of licensed premises. I believe that, by requesting the privilege to dispense liquor, the licensee implicitly consents to such regulations and inspections and makes a limited waiver of his Fourth Amendment rights. (*Manchester Press Club* v. *State Liq. Comm.*, 89 N. H. 442; *Oklahoma Alcoholic Beverage Control Bd.* v. *McCulley*, 377 P. 2d 568 [Okla., 1963]; cf. *Brown* v. *State*, 391 S. W. 2d 425 [Tex. Crim. App., 1965].)

The right to inspect is not merely confined to optical observation of areas open to the public. (*Oklahoma Alcoholic Beverage Control Bd.* v. *McCulley, supra*; *Silber* v. *Bloodgood*, 177 Wis. 608 [1922]; see, also, *Martin* v. *Reynolds Metals Corp.*, 297 F. 2d 49, 57 [9th Cir., 1961].)

Thus, in *Matter of Fortino* v. *State Liq. Auth.* (273 N. Y. 31 [1936]), the Authority inspector, in the course of the inspection provided for by the statute, found contraband liquor under straw in a kennel attached to the licensed premises. Yet this court upheld disciplinary action. The same result was reached

in *Matter of Okamura* v. *Hostetter* (20 A D 2d 757 [1st Dept., 1964], mot. for lv. to app. den. 14 N Y 2d 485 [inspection of kitchen, storeroom, dining room and an area claimed by the licensee to be his personal living quarters]).

Considering the peculiar nature of the liquor industry, I believe that evidence discovered during administrative inspections of licensed premises may be used in an administrative hearing even though the inspector may not have possessed probable cause to believe that a violation of the Alcoholic Beverage Control Law was being committed upon the premises. Additionally, where, as here, consent was given for the inspection, I do not believe a constitutional problem is even presented. (Cf. *Camara* v. *Municipal Ct.*, 387 U. S. 523; *See* v. *City of Seattle*, 387 U. S. 541.)

I submit that the broad language of the majority goes far beyond reasonable constitutional requirements and will seriously hamper reasonable regulation of the liquor industry.

For the foregoing reasons, the order of the Appellate Division should be reversed and the order of the State Liquor Authority suspending petitioner's license reinstated.

In the *Matter of Finn's Liq. Shop* v. *State Liq. Auth.*:

Judges BURKE, BERGAN, KEATING and BREITEL concur with Chief Judge FULD; Judge JASEN dissents and votes to reverse in a separate opinion in which Judge SCILEPPI concurs.

Order affirmed.

In *Matter of La Penta* v. *State Liq. Auth.*:

Judges BURKE, SCILEPPI, BERGAN, KEATING, BREITEL and JASEN concur.

Order affirmed.

In *Matter of Malik* v. *State Liq. Auth.*:

Judges BURKE, SCILEPPI, BERGAN, KEATING, BREITEL and JASEN concur.

Order affirmed.